

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs June 24, 2008

**STATE OF TENNESSEE v. ERICA D. GOODNER AND
TROY ALLEN GOODNER**

**Direct Appeal from the Criminal Court for Hamilton County
No. 252211 & 252212 Don W. Poole, Judge**

No. E2007-01048-CCA-R3-CD - Filed March 10, 2009

Defendant-Appellants, Erica D. Goodner and Troy Allen Goodner,¹ were each convicted by a Hamilton County jury of reckless aggravated assault, a Class D felony, and criminally negligent homicide, a Class E felony. Both defendant-appellants were sentenced by the trial court as Range I, standard offenders to four years for the reckless aggravated assault convictions and two years for the criminally negligent homicide convictions to be served concurrently, for effective four year sentences. In Erica Goodner's appeal, she argues that the trial court erred by: (1) finding that her convictions were supported by the evidence; (2) sentencing her to four years in confinement; (3) denying her request for probation; (4) denying her motion to admit portions of Troy Goodner's statement to police; and (5) denying her motion to be tried separately from Troy Goodner. In Troy Goodner's appeal, he argues that the trial court erred by: (1) finding his convictions were supported by the evidence; (2) overruling his objection to the introduction of three photographs of the victim; and (3) finding that the prosecutor did not engage in misconduct during closing arguments. We conclude that the Defendants' double jeopardy protections mandate that each Defendant's negligent homicide conviction merge into the reckless aggravated assault conviction. We further modify Erica Goodner's sentence to an effective three-year sentence.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court
Affirmed as Modified**

CAMILLE R. McMULLEN, J., delivered the opinion of the court, in which DAVID H. WELLES and JAMES CURWOOD WITT, JR., JJ., joined.

Robert D. Philyaw, Signal Mountain, Tennessee, for the appellant, Erica D. Goodner.

Mike A. Little, Chattanooga, Tennessee, for the appellant, Troy Allen Goodner.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General;

¹Erica Goodner states in her brief that she and Troy are not married. Because both appellants coincidentally possess that same last name, this Court will occasionally refer to them by their first names.

William H. Cox, District Attorney General; and Lila Statom and Leslie Longshore, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

FACTS AND PROCEDURAL HISTORY

This case concerns the death of Garrett Goodner, a nineteen-month-old victim who sustained fatal injuries while being cared for by his mother, Erica Goodner, and her boyfriend, Troy Goodner, at their home on May 21, 2004. The victim died as a result of being shaken and beaten to death.

On January 27, 2007, a jury convicted Erica Goodner and Troy Goodner of reckless aggravated assault and criminally negligent homicide. On March 26, 2007, the trial court sentenced each of the defendant-appellants as Range I, standard offenders to four years for the reckless aggravated assault charge and two years for the criminally negligent homicide charge to be served concurrently, for effective sentences of four years. Both defendant-appellants filed their motions for judgment of acquittal or new trial on April 24, 2007. On May 9, 2007, the trial court overruled these motions. Erica Goodner filed her notice of appeal on April 18, 2007. Troy Goodner filed his notice of appeal on May 11, 2007.

Trial. Both defendant-appellants challenge the sufficiency of the evidence supporting their convictions. A brief summary of the twenty witnesses which were called by the state at trial is therefore necessary. Neither defendant-appellants elected to present proof.

The first witness at trial, Patricia Matthews, supervisor of the communications department of the Chattanooga Police Department, testified that her department answers all emergency and non-emergency calls, dispatches officers, and keeps records of the calls. She stated that she received the 9-1-1 call from Erica on May 21, 2004 concerning her nineteen-month-old son. This 9-1-1 call was played to the jury.

Patrice Schermerhorn, a paramedic for Hamilton County EMS, testified that she received a call to go to Erica and Troy's residence (hereinafter "the Goodners' home") on May 21, 2004, at approximately 11:30 a.m. The nature of the call was a "seizure." She and her partner, Paul Swafford, who is also a paramedic, left immediately and arrived at the residence at 11:41 a.m. As they got out of the truck, Schermerhorn noticed two individuals, identified as Erica Goodner and Troy Goodner, standing outside the door to their home. As she and Swafford approached the residence, Erica and Troy indicated that the child was inside. Schermerhorn stated that Erica and Troy did not exhibit any sense of urgency about the situation and did not rush them into the residence to care for the child. Schermerhorn said Erica's and Troy's reaction was unusual because:

[A]ny time that there's a child involved with our calls, there is a very much heightened sense of urgency, regardless of the nature of the call. Parents are usually either, you know, [a] motion in force, telling us to hurry up, hurry up, get to my child, help my child. Or a lot of times they've even picked the child up, they're already at the ambulance with the child before we even get out of the unit.

After entering the home, Schermerhorn "found Garrett laying [sic] on the floor on his back, motionless, unresponsive, just laying [sic] there on the carpet in a diaper." She noticed bruises on

the child's chest and abdomen, his upward gaze, and the fact that he was posturing, which means that "the body stiffens up, the hands kind of – the arms come close to the body and the hands kind of turn outwards and the whole body [is] stiff." She explained that the upward gaze is a sign of a hemorrhage in the brain. After evaluating the condition of the child, Schermerhorn knew they had an emergency situation and retrieved the pediatric equipment. Although they were initially called to the scene for a seizure, she believed the child had suffered trauma related to child abuse. Schermerhorn did not notice the child having any convulsions that would be related to a seizure. She said she did not talk to Erica or Troy at their home and that she and Swafford were only at the scene for eight minutes. Schermerhorn said that Erica was not upset or crying when they arrived on the scene.

Paul Swafford, Jr., a Hamilton County EMS paramedic and also Schermerhorn's partner, testified that they received a call regarding a pediatric seizure at the Goodner's home on May 21, 2004, at 11:28 a.m. He said that he encountered a man and a woman, later identified by him as Erica and Troy Goodner, at the front of the Goodner home, and they directed him inside the home. Swafford described both of these individuals as "calm" and explained, "[T]hey weren't hysterical, screaming, yelling." He first saw the child in the front room in the middle of the floor. The child's status was "critical"; "he was unconscious, he was unresponsive, . . . he was very stiff and rigid and posturing." He assessed the child's condition and headed to the ambulance with Erica Goodner. Once there, he immediately started questioning Erica about whether the child had been having nausea, vomiting, diarrhea, or a fever or whether he had signs of dehydration or recent chemical ingestion, all of which she denied. He said that Erica also denied any recent trauma to the child. When he asked her how long the child had been in this condition, Erica told him, "[H]e was up this morning and went to lay [sic] down to take a nap. I went in there and woke him up, it is like he is having a seizure or something." She did not tell him the exact time when she checked on the child. Swafford testified that posturing is a sign of neurological injury. Although Erica rode with him in the ambulance, Troy did not. Swafford noticed the child had several old bruises on his chest and abdomen and stated that he did not cause these bruises while he treated the child. He gave the child oxygen and Valium, before putting a tube down the child's throat to assist his breathing. Swafford did not have trouble placing the tube down the child's throat because the child had relaxed and had started to breathe on his own. In his report, Swafford said that the child "appear[ed] seizing without any movement. He was stiff from head to toe with hands gripping to fists." He documented "no tremors, no shaking and patient appears to be status, nonstop, decerebrate posturing." In his notes, Swafford said that Erica "assisted well and appropriately" meaning that she helped Swafford as he was treating the child during the ambulance ride. He also stated that Erica Goodner was crying on the way to the hospital.

Shawn Morris, the biological father of the child, testified that he had a three and a half year relationship with Erica and that Garrett Goodner was the product of that relationship. He said that Erica moved out in October of 2003 because of disagreement over her seeing other men, and she took Garrett with her. Before Erica moved out, he saw Garrett all the time and shared in taking him to day care while they both worked. For a few months after she moved out, Morris was able to see Garrett every week or every other week. Morris first met Troy Goodner in November of 2003 when Troy and Erica dropped Garrett off at his house one evening. He was aware that Erica and Troy were dating and had moved in together by November of 2003. In January or early February, Erica and Troy stopped letting Morris see his child. Morris said that Erica would not allow him to see the child after she claimed that Morris had allowed another woman to leave scratches on the child's head

while Garrett was in his care. Morris filed a petition for visitation and was given supervised visitation with the child on May 19, 2004, with the visits to begin the following week. The judge granted supervised visitation to Morris because Erica had claimed that Garrett had “an aversion to men” at the hearing, although Morris had never noticed such an aversion. The next day, on May 20th, Morris was notified that Garrett was rushed to the hospital for seizures. He arrived at the hospital at around 12:30 and saw Erica, Troy, Erica’s mother and father, Erica’s stepfather, and Erica’s sister. Morris said that he asked Erica what happened to Garrett, and she gave him “a number of different answers.”

Gary McBryar, Erica’s stepfather, testified that he had been married to Erica’s mother, Tina McBryar, for the last ten years. He and Erica’s mother took care of Garrett nearly every weekend and often several days during the week since he was born. Mr. McBryar stated that he and Tina kept Garrett the weekend before he died and that Garrett was “running, playing, jumping and hollering.” He said he did not notice any bruises on Garrett that weekend; he was healthy, and Garrett did not have any accidents while he was in their care. He explained that he met Troy Goodner when he started dating Erica, and that they seemed to have a good relationship. Mr. McBryar said that Garrett slept well during their care until March, when he would “wake up in the middle of the night just a screaming and crying and it was like he was asleep. We could talk to him and he wouldn’t acknowledge us.” Sometimes it would take between fifteen to forty minutes to calm him down. He said that Erica never asked them to keep Garrett; they just volunteered to take care of him. Mr. McBryar stated that one time when he and Troy were doing some gardening together, Troy told him that Shawn Morris would never see Garrett again, if Troy had anything to do with it. He admitted that he might have made a statement to Officer Tilley that Troy had said Shawn Morris would never see Garrett again, until Garrett is able to talk about what happened during the visit. Mr. McBryar acknowledged that Troy’s statement might have been made after February. Mr. McBryar said that Garrett had developed a habit of head-butting people and things. He also stated that Garrett had a habit of hitting himself in the forehead with his fists.

Tina McBryar, Erica’s mother, testified that she and her husband, Gary McBryar, often kept Garrett for two to three days at a time, depending on Erica’s work schedule. The last time Garrett came to visit, they met Erica and Troy at Gary McBryar’s workplace on Friday and took Garrett. That Friday, she said Garrett was acting normally—he was playing and cuddling. Ms. McBryar took Garrett back to Erica’s early Monday afternoon. During that weekend, she made a video of Garrett, which was shown to the jury. She said that when Garrett would stay with them, he would go to bed at 11:30 p.m. and sleep most of the night until 8:30 a.m. or 9:00 a.m. However, in November or December, Garrett started having bad dreams that would cause him to wake up crying, which concerned the McBryars. He would wake up at 1:00 a.m. or 2:00 a.m. crying and upset and would stay awake for thirty minutes to an hour. Ms. McBryar stated that the last time Garrett stayed with them, he woke up with a bad dream and stayed awake for fifteen to twenty minutes before he went back to sleep. Ms. McBryar said that Garrett did not sustain any injuries at her house the weekend before his death. The Thursday before Garrett was injured, Ms. McBryar went with Erica to the juvenile court, and Troy kept Garrett because “she had nobody else to keep him.” Shawn Morris was granted supervised visitation. After court, Ms. McBryar took Erica back to her car at Parkridge Hospital, and she did not see Troy at all.

Ms. McBryar first learned that Garrett had been taken to the hospital when Erica called after eleven o’clock and said, “Mother, something’s wrong with Garrett, he’s not responding and we’re

on the way to the emergency room.” When she arrived at the hospital, Ms. McBryar saw her husband, Gary McBryar, and Erica, Shawn, her daughter Stacy, and maybe Troy. An hour to an hour and a half later, Ms. McBryar asked Troy what happened to Garrett, and Troy said, “The only thing I know is they had to flush his blood out because they found toxins in his blood and it could be because he was swimming the day before because he swallowed some chlorine.”

Ms. McBryar said that the day after Garrett was pronounced dead at the hospital, Erica and Troy and some church members gathered at their home to have lunch. During lunch, Troy said, “I know how the police system works, they’re going to come to me and tell me that – they’re going to come to Erica and tell Erica that I beat her son to death and they’re going to tell me that Erica said I beat her son to death.” At the time Troy made this statement, Ms. McBryar said she did not know what caused the death of her grandson.

At the funeral home, Ms. McBryar said that Erica told her she was being disrespectful to Troy by refusing to speak with him and that Troy was there for Garrett and loved Garrett. Ms. McBryar was afraid that she would be asked to leave the funeral home if she continued to avoid Troy.

Ms. McBryar said that Garrett would often become upset when it was time for him to return home. She said, “Whenever [Garrett] would see the truck pull up, he would start crying. At first, we thought this was on our part, that he wanted to stay with us.” On the Monday before his death, Ms. McBryar said that “Garrett was fine until I pulled up in the parking lot of their apartment, and then when Troy walked out the door, he started crying.”

Ms. McBryar said that when Erica and Shawn Morris talked to the doctors at the hospital about Garrett’s condition, she was able to talk to Troy about what happened to Garrett. She acknowledged that she did not know what other conversations Troy had with other people at the hospital at the time that he told her about the need to flush chlorine out of Garrett’s system. On Sunday, May 23rd, the day after Garrett was pronounced dead at the hospital, Ms. McBryar acknowledged that Troy made the statement about the police telling him that he beat Garrett to death a couple of days after being interviewed by the police.

Ms. McBryar acknowledged that she and Erica had a disagreement at Garrett’s funeral regarding the burial plans for Garrett. Troy was responsible for the burial, and Erica was responsible for the funeral service. Ms. McBryar said that she and her husband had asked if Garrett could be buried near their home so they could take care of the grave. She said that it would not cost anything to bury Garrett near their home. Ms. McBryar stated that Garrett was buried at Northgate and as of yet, Garrett did not have a tombstone at his grave.

Stacy Goodner Murphy, Erica’s sister, testified that she lived with her mother and step-father, Tina and Gary McBryar, and said that the last time her nephew, Garrett, was in her parent’s home she was at home all weekend. She said Garrett “acted normal, like he always did, always playing, running around. We’d play hide and seek around the house and he’d just run around and play the whole time.” She said that she did not notice him being sick, and the last time she saw Garrett was Sunday night when he went to sleep. She said that Garrett slept with her mother and her step-father, but that she had lain down beside him that night. She said she was often around when Garrett was dropped off at Erica and Troy’s home, and when they pulled up, either at her truck or at the

apartment, “[Garrett] would just start crying. He just, I mean, cried really hard. And when we got him out of the car and gave him to Erica, he calmed down, and he was fine as long as she was by herself.” However, “[i]f Troy was in the car with him and came close, Garrett would just start screaming, he didn’t want him anywhere around him.” She explained Garrett’s behavior: “He would just . . . clutch on to whoever was holding him. He didn’t want to go anywhere around him.” Stacy Goodner said that after mid-March, she noticed Garrett crying during the two to three times she was around when he was taken home. She acknowledged that Garrett got lots of attention from her mother and step-father and from her sister and her when Garrett was at their home. She also acknowledged that Troy was nothing but loving to Garrett while she was around.

Charles Goodner, Erica’s father, testified that he would keep Garrett one to two nights a week if Erica had to work late or Erica and Troy wanted to go somewhere. He said that Garrett would not spend the night with him when he took care of him. He said that he kept Garrett two nights before Garrett’s death. The first night Garrett was fine, but the second night, Wednesday night, Garrett was not feeling well and did not want to be left alone, so he brought him to church with him instead of taking him to the nursery. He said Garrett did not have a fever, throw up, or whine and cry, but “he just wasn’t as active as he normally was. He was always running somewhere, and he just wasn’t running that night.” Charles Goodner said that when Erica brought Garrett to Charles at his church, she told him that Garrett wasn’t feeling well. He remembered telling Detective Tilley that Erica told him not to give Garrett milk because he had thrown up earlier. He said that he did not notice any bruises on Garrett either of the two nights he kept him that week and that Erica picked up Garrett at 10:30 p.m. or 11:00 p.m. Wednesday night. Charles Goodner stated that Garrett played some in the church and then slept some and that he felt comfortable taking care of Garrett, even though he wasn’t feeling well. He remembered telling Detective Tilley that Garrett was feeling better by the time he was picked up on Wednesday night. After Garrett’s funeral, he “didn’t see [Erica] for a few weeks after [Garrett] died, she went into hiding for a while, then she moved in with me.”

Caroline Pereira, a neighbor, testified that on May 20, Erica and Troy had been living in the adjacent duplex for about a month and a half. She said that between 11:30 p.m. on May 20, and midnight on May 21, she was trying to go to sleep and starting hearing noises. Ms. Pereira explained:

I remember hearing sounds coming from their side that – I couldn’t tell you exactly what it was. I know it was very loud and it kept me up. And . . . I remember making the statement that [it] sounded like they were maybe installing like a home theater system or something, but there was a lot of noise going on on their side. And I say home theater system because of how the surround sound is in a movie, or like how the subwoofer is real [sic] loud and there’s a lot of commotion of some kind.

She continued, “I could hear noises that were consistent with something up against a wall.” She said that she saw an ambulance pull up in the Goodner’s driveway at around 10:00 or 10:30 a.m., and paramedics went into their home and brought Garrett out. At a later time, Troy told her that “the injuries that Garrett had gotten were from being at, he thought, being at the grandparents’, [Erica’s] parents’, house that weekend, and that [Garrett] was standing on a truck bed, their truck, and the truck lid was open and he fell off, he hit a retaining wall, a concrete retaining wall, and then hit the gravel below and that’s how he had speckled bruising on his cheeks.” She said that she saw Erica and Troy on July 4, and they acted as if everything was fine; they were having fun. Pereira stated

that the loud sound that she heard kept her awake for about twenty minutes, but she was not sure if she fell asleep before the noise stopped. She said that she did not hear any crying that night. Pereira said that Troy had told her about Garrett falling off of his grandparents' truck seven to eight days after Garrett was taken to the hospital. Pereira said that she believed the loud noise that she heard from her second floor bedroom was coming from the first floor of the Goodners' apartment.

Mary Cooke, Erica's aunt and Tina McBryar's sister, testified that she found out that Garrett was taken to the hospital when Tina McBryar called and said that Garrett "had an aneurysm that caused a seizure and they didn't think he was going to make it." When she arrived at the hospital sometime after 2:00 p.m., she saw Tina, Erica, Troy, Shawn, Gary, Stacy, and possibly some of Shawn's family. Troy told her that he and Erica had taken Garrett to the swimming pool the day before, and they believed that he had swallowed too much pool water and had chlorine in his system. Then she said Erica came out of the bathroom and said that Garrett had been throwing up after they got home from the pool, and he was exhausted. Cooke said Troy told her that he and Erica put Garrett to bed around eight and that he woke up around midnight and called out "Momma"; then Troy went in to check on him so Erica could sleep, changed his diaper, got him back to sleep, and then went back to sleep. Cooke said that Erica told her that she checked on Garrett at around 10:00 a.m. the next morning because he had not woken up, and she "said he was still asleep, she couldn't wake him up so she just left him in bed, she thought he was tired from the sun." She said that Troy told her he checked on Garrett around 11:00 a.m., and when he walked into the room, Garrett was having a seizure, and he told Erica to call 9-1-1. Cooke stated that Erica told her at the funeral home that law enforcement was investigating Tina and Gary McBryar for accidents that Garrett had at their home. She said Erica told her that the last time Garrett had stayed with them he fell from Gary McBryar's pickup truck and hit his head, and they believed this head injury was the reason for his death. Cooke said that Erica told her that she did not notice any cuts or bruises after his visit with the McBryars, but the Monday or Tuesday after he came home one of his eyes was really red like a broken blood vessel, and he had thrown up. Cooke said Erica asked her to be nice to Troy at the funeral home. During the funeral, Cooke said that Erica was "quiet, crying at times, controlled at times," and "she just kind of stayed to herself a lot." Cooke stated she was aware that Erica and Troy went away for a couple of days after the funeral. She stated that her conversation with Troy and Erica regarding Garrett took place during the first day of visitation at the funeral home. She said that she was aware that the police had already talked to Troy and Erica at that time and acknowledged that some of the information she gained at the hospital was from Troy, Tina, and Erica. Cooke acknowledged that Erica had been crying at the funeral home. She said that Erica and Troy stayed together and supported one another at the funeral home.

Kevin Billingsly, the general manager at Bud's Sport's Bar, testified that he first met Troy when he inquired several times about a position in the kitchen. He said that Troy had come by with Erica and Garrett to ask about the job. Billingsly said that Garrett did not look sick at the time and that he and some of the employees were "playing with [Garrett] and talking to him, kind of passing around a little one like you do, I suppose." A few days later, Troy came back alone to ask about the kitchen position, and Billingsly asked how Erica and Garrett were doing. Troy told him that Garrett died, and Billingsly described Troy's demeanor as emotionless. Troy told him that Garrett had an aneurysm, and died at the hospital over the weekend. Troy told him that "the doctor thought [Garrett] may have had some bleeding over the course of a three or four-week period which led to the aneurysm and that's what had caused his death." He remembered Troy telling him that "that probably would explain why Garrett had been lethargic over the course of two or three weeks, that they had noticed he was lethargic." After Billingsly spoke to Officer Tilley, he saw Troy again.

Troy asked about the job again, and Billingsly told him that it was best to not even consider the kitchen job. Troy discussed Garrett with him again, saying that “something had happened at the grandparent’s house . . . it had something to do with the fireplace hearth that Garrett may have hit his head on.”

Stacey Field, a friend of Erica Goodner’s, testified that she met Erica through Shawn Morris when they played on a dart team together. After Erica and Shawn broke up, Erica brought Troy Goodner to play darts. Field said that she saw Erica at least every Wednesday, that they were friends, and that she would often see Erica and Shawn on the weekends at parties at her house. Field said that she had a conversation with Erica about Shawn Morris having visitation with Garrett: “I told her that [it] wasn’t right to keep Shawn away from [Garrett]. And she said she had her reasons and I said well, there is [sic] not any reasons.” Erica told her that Morris would have to take her to court, and Field responded, “Erica, they’re not going to rule that he can’t see Garrett unless there is abuse or some kind of neglect, and there’s not, so, you know, this is just crazy, you need to let Shawn [Morris] see his son.” Field learned a short time later that Erica claimed she found scratches on Garrett’s head “and until that matter was resolved, [Garrett] was not going back to Shawn.” Field said that Erica was present at the dart game two days prior to Garrett’s admission to the hospital and did not mention that Garrett had been sick. Field learned that Garrett had been taken to the hospital from Shawn Morris on Saturday. On Sunday, Erica called Field, who was surprised to hear from her, and said, “Hey, I guess you heard what happened. I just wanted to call and let you know I won’t be at darts Wednesday.” During this call, Field said that Erica was not crying or showing any emotion. Field saw Erica and Troy at the funeral home and stated that Erica “wasn’t crying, . . . she was outside smoking and sometimes even laughing” and that Troy was acting the same way. She said Erica and Troy “were inseparable and just laughing at times outside the funeral home. I mean [it] was just bizarre to me.” Field said that she overheard Erica asking someone to take care of a plant for her because she was going to Florida for a short period of time. Field said that Erica had told her, “Troy was the best thing that ever happened to [Garrett and me].” Field said that although she remained friends with Erica after Erica and Shawn broke up, she did not remain friends with Erica after Garrett’s funeral.

Matthew Rogers, a patroller for the Chattanooga Police Department during 2004, testified that he received a dispatch on May 21, 2004, to go to T.C. Thompson Children’s Hospital regarding a child abuse call. At the hospital, Rogers determined that this was a case of child abuse, and he contacted his supervisor and some detectives so that they could get to the crime scene. Rogers said he made a limited report regarding the abuse, and then it was the detective’s duty to conduct an investigation.

Greg Mardis, an investigator with the Chattanooga Police Department, testified that on May, 21, 2004, he received a call from dispatch at 3:50 p.m. to go the Goodners’ home on Edith Lane. He said that the call was regarding a child at the hospital that would probably not survive. He arrived at Edith Lane at 4:30 p.m., and there was a uniformed officer securing the scene. As the crime scene investigator, Inv. Mardis had to “get what information [that was] available as to what may have happened, go into the scene, look around, look for any evidence, any things that are obviously evidence that would stand out, anything that would help explain what happened.” He said he also often records the scene “with photography, video, [and] make[s] sketches of the scenes” Investigator Mardis and Sergeant Johnson walked through and video-taped the Goodners’ home. A copy of this video was played for the jury. Investigator Mardis described some of the things visible in the video, which included evidence that a meal was in the process of being prepared. He stated that

the video showed that there were toys, a toy box, a child's bed, a dresser, a stereo, a baby monitor, a changing table, a diaper hamper, and children's clothes in the room. He also stated that there was a second bedroom that didn't have any furniture in it. Investigator Mardis identified several still photographs that were taken at the scene. Some of the photographs depicted cooked, but not burned, biscuits in the oven, and one cooked piece of bacon in the skillet on the stove. Investigator Mardis went to the hospital at 7:56 p.m. on May 21, 2004, to talk to the attending physician and get permission to photograph Garrett for the purpose of recording any visible injuries to him at that time. Investigator Mardis explained, diagramed, and measured distances between things at the Goodners' home, and these diagrams were shown to the jury. He stated that total square footage of the Goodners' apartment was 900 square feet. Investigator Mardis acknowledged that he video-taped the front door of the Goodners' apartment to show that there was no forced entry. He made notes that there appeared to be no struggle in the home. He said the boxes that were outside the home and the pictures leaning against the sofa were consistent with someone who had just moved into the apartment. He stated that he did not collect the sheets from the crib or anything out of the child's room for evidence and did not take the toy chest for evidence or test the toy chest for samples. Investigator Mardis acknowledged that he did not examine any of the bottles on the counter in the kitchen. He admitted that although the front door was video-taped to show that there was no forced entry, there was no video-tape of the back door. However, he said that another officer checked the back door and found that it was locked. He acknowledged that other than some clothes out of place, the apartment was fairly neat and clean. Investigator Mardis stated he thought someone had told him that Erica and Troy had been using the living room as sleeping quarters since they had been in the apartment. He explained that he just recorded the scene and did not make any conclusions regarding the cause of Garrett's death based on what he found there.

Daniel Franklin Fisher, M.D., testified that he moved to Chattanooga in 1989, started a kidney transplant program, and became medical director of the Tennessee Donor Services, the local branch of the Nashville organ bank. He stated that he became involved in this case through his work with the Tennessee Donor Services. Dr. Fisher stated he first encountered Garrett in the operating room, and a surgeon from the University of Pittsburgh and Dr. Sheveree Angular, his chief resident, were also present at that time. Dr. Fisher said that he did not review a CT scan to see if the organs in the abdominal area would be in good condition because he does not typically do that under these circumstances. He said that he believed that the organs would be valuable, and he had reviewed x-rays that indicated that the abdominal organs would be normal. He assumed he would be able to take the small bowel, the liver, and both kidneys for transplantation. Dr. Fisher said that the liver was taken out and sent to Pittsburgh for transplantation, and he did not recall any problems with the liver. However, when they looked at the small bowel, they found a large blood clot that involved blood flow to the small bowel, and the surgeon from the University of Pittsburgh declined to take this organ to Pittsburgh because he believed it would not be appropriate for transplantation. Dr. Fisher said that it was very unusual to see a blood clot in the small bowel, and the clot "represented a great deal of force applied somehow to this child's abdomen. It could have been a direct blow, it could have been a tremendous shake, but some force was applied to that abdomen for that hematoma to be right there." He defined a hematoma as a "collection of blood and tissue" and said that it can be spontaneous in a situation where a person has a low platelet count or thin blood or in a trauma situation such as a car wreck, a fall, or from blunt force to the abdomen. Nothing in Garrett's medical records indicated that the child had low platelets or had been on blood thinners, and Dr. Fisher did not expect the clot to be in the small bowel. He did not believe that the clot was spontaneous; instead, he thought the clot was related to the issues that required the child to go to the hospital. During the operation on Garrett, the surgeon from the University of Pittsburgh decided not to take his small intestine because of the

compromised blood flow to the bowel. Dr. Fisher said that the area surrounding the child's left kidney also had been injured underneath the colon and between the colon and the left kidney. Although the kidney itself was uninjured, there was a collection of blood in that area, which was unusual, and this injury would have been caused by force to the abdomen. There was another hematoma around the right kidney similar to the one around the left kidney, and this also would have been caused by "some unusual force to the abdomen." Dr. Fisher said that the only thing that could cause spontaneous hematomas around the left and right kidneys was if the child had leukemia, and there was nothing in Garrett's medical records to indicate that Garrett had leukemia. There was also a hematoma around the child's left lung, which was unusual. The numerous hematomas on the child were "consistent with a large amount of force." Dr. Fisher said they also found small hemorrhages around the heart but could not tell the court whether they were from force or the surgical manipulation required to obtain the organs. Dr. Fisher said the hematomas in the left lung, small bowel, left kidney, and right kidney could have been caused by violently shaking the child. Dr. Fisher acknowledged that the kidneys could have been used for transplantation.

Tracy McGhee, an investigator with the crime scene unit of the Chattanooga Police Department, testified that he received a phone call on May 26, to go to the Goodners' home to search for evidence and document the crime scene after the search warrant was obtained. Investigator McGhee was aware that other detectives had been at the scene a few days earlier. While at the Goodners' home, he collected a digital camera with several photographs and sent them to the crime scene unit office and secured them in the evidence locker. He did not know how many photographs were on the camera or what the photographs in the camera depicted.

Mike Tilley, a detective with the homicide division in 2004, testified that the child abuse detective was notified first about Garrett's condition, and then contacted him in the homicide division when it became clear that Garrett would not survive. Detective Tilley went to the hospital around 4:00 p.m. and spoke with Det. Darling of the child abuse division. Detective Darling gave him a summary of what her department found upon arriving at the hospital, and she directed him to Erica, Troy and Shawn Morris. Detective Tilley said that Erica was "calm, she was quiet, [and it] appeared she may have been crying at one time; she wasn't at the time I first saw her." He said Troy acted normal. Detective Tilley had Erica, Troy, and Shawn Morris come out to the service center to be interviewed. During their interviews, Erica and Troy told Det. Tilley that they were with Garrett at their home from Thursday afternoon, May 20, to Friday morning, May 21. Detective Tilley said he was not able to talk to Dr. Keegan, but he did attend the child's autopsy on May 24. Through these interviews, Det. Tilley discovered that the child spent the afternoon at the swimming pool and that photos were taken while he was at the pool on May 20th. He later obtained a search warrant for collecting those photographs. Detective Tilley identified the photographs that were on the camera that were taken during the search, and these pictures were shown to the jury. Detective Tilley said that he was not with Inv. Mardis during his first visit to Goodners' home on May 21, 2004, because he went immediately to the hospital, and then from the hospital to the service center to interview Erica, Troy, and Shawn Morris. He did not go to the Goodners' home and did not talk to Inv. Mardis about the Goodner investigation. Detective Tilley stated that he did not talk to Dr. Kessler about the autopsy on the child's eyes because someone from the district attorney's office talked to him about that issue. Detective Tilley said that he recalled taking Gary and Tina McBryar's statements on June 24, 2004. He acknowledged that Gary McBryar told him that Troy said that if he had anything to do with it, that Garrett would not see his father until he was old enough to tell us how he got those bruises, referring to the scratches, on his head. Detective Tilley also said that Ms. McBryar told him that when they took Garrett home, as soon as the truck pulled up, Garrett would start crying, not that

he would start crying when he saw Troy. Detective Tilley said that he spoke to Sgt. Johnson, who told him that they did not collect anything at the Goodners' home and that everything appeared normal. Detective Tilley said that he did not go to the scene himself. He said that there was no blood collected at the Goodners' home and that there was no evidence of a struggle. Detective Tilley stated that the first time he saw Erica was at the hospital between 4:30 and 5:00 p.m. on May 21, and Erica had been at the hospital for about four or five hours by the time he saw her. Detective Tilley talked to Erica at the service center office at 6:00 p.m. When he first went to the Goodners' home to search for the digital camera, Erica got the camera out of the truck and brought it to him. Detective Tilley said that the crime scene unit took the camera, and he was present when the pictures were downloaded. Detective Tilley said that there were a lot of pictures taken of Garrett at the pool, and he looked happy and healthy. Detective Tilley said that Erica brought up the possibility of Garrett having an accident at the McBryar's home, but at the time they were investigating anything that could have caused Garrett's death, and he talked to several people about the possibility of an accident at the McBryar's home. Detective Tilley said that Erica called him several times, and she told him when her cell phone number changed. Detective Tilley denied telling some of Erica's family that he knew Erica did not have anything to do with Garrett's death. Detective Tilley said the proof that Erica had something to do with Garrett's death was that she was present when he sustained his injuries.

Julia Whitefield, M.D., a pediatric emergency medicine physician, testified that she treated Garrett on the day of his death. She summarized her educational background and work experience. She stated that she had specialty training in pediatric emergency medicine and child abuse. She obtained her training associated with child abuse at the C. Henry Kemp Center in Denver, Colorado. She explained that "C. Henry Kemp was the first describer in the literature of the battered child syndrome. He actually found it together with his students, his first generation students, who were [her] direct teachers, [and] he founded the C. Henry Kemp Center, which specialized in child abuse." During her time at this center, she volunteered to train in the sub-specialty of child abuse for three years which involved "evaluation of battered children, sexual abuse, physical abuse, emotional abuse, and it also [meant] that [she] had to testify in court very early on in [her] career." Dr. Whitefield said she participated in "large studies to evaluate the care of pediatric patients in the outpatient emergency setup." She explained that she was board certified in pediatrics, general pediatrics, and pediatric emergency medicine; she had testified as an expert in pediatric emergency medicine approximately twenty times; and this was her third or fourth time to testify in Tennessee. She said that she has been qualified to testify as an expert in the field of child abuse eight times, two or three of which were in Tennessee. Dr. Whitefield was tendered as an expert in pediatric emergency medicine and child abuse.

Dr. Whitefield stated that she was working at T.C. Thompson Hospital in the emergency room on May 21 and treated Garrett. She said that Garrett was brought in by ambulance before noon, and "he was in extremis, he was in critical condition and he was so ill that the paramedics that [sic] attended to him had to breathe for him." She remembered the paramedics putting a breathing tube down his throat, and she thought he had a heart rate at that time. Dr. Whitefield said Garrett definitely had a heart rate when she got to see him.

When Dr. Whitefield first examined Garrett, she realized that he was not breathing on his own, got his history from EMS, determined whether he had a heartbeat, and felt for his pulse. She said Garrett was in "extremis and posturing." She described posturing as an "unnatural position"

where “you stretch out with your head to the back.” Posturing means “that there is a horrible dysfunction of the brain itself, that there was some damage done to the brain.” She noted that his pulse was 120, and he had good equal breath sounds as they were breathing for him, and his blood pressure was within the normal range. Dr. Whitefield observed some old greenish bruises on the forehead above his left eyebrow and some older brown bruises on his abdomen. She looked at his eardrums, which were clear. She briefly examined his throat. Dr. Whitefield said Garrett’s pupils were unequal; one was four millimeters while the other was five millimeters. She explained that this was important because when pupils are unequal, one must consider which parts of the brain have been hurt or traumatized. She also saw retinal hemorrhages. She said that Garrett had no heart murmur, and he had a regular heart rate. She said he had a soft abdomen, but that did not rule out damage to his organs. She examined the other parts of his skin and rolled him on his back. She said that she took Garrett’s history from the EMS and Erica and Troy because “about ninety-five percent of our diagnoses are based on the histories” of the patients, and “it’s the history that points me in a certain direction.” She said that the history helps determine the proper treatment and also tells her if the history is consistent with what she sees in the patient. Erica and Troy told her that Garrett had been at the pool the day before with Erica. Erica told her that she thought Garrett was exhausted, and they were not surprised when he slept a little later. Troy said that Garrett had slept until 10:00 a.m., the day that Dr. Whitefield treated him. Troy also told Dr. Whitefield that Garrett woke up for a short time, which was confirmed by Erica. Troy said that he went to get him up at 11:00 a.m. and found that he was posturing and lifeless. Troy or Erica or both of them told Dr. Whitefield that they put Garrett in the front room and called 9-1-1, and the ambulance arrived a few minutes after they had first discovered Garrett’s condition. The paramedics then resuscitated Garrett. Erica denied that Garrett had recently vomited, had a fever, diarrhea, neurological symptoms, a cough, or previous surgeries or hospitalizations. Dr. Whitefield ordered blood tests and bleeding studies because of the bruises and retinal hemorrhages. She further ordered a chest x-ray to verify the position of the intubation tube and ordered a CAT scan of his head and his abdomen. The CAT scan of the head revealed cerebral edema, which is a swelling of the brain in response to injury, and showed that the damage to his brain was on the left side, which corresponded to the bruise above Garrett’s right eyebrow. The CAT scan also showed evidence of parenchyma hemorrhage, which is bruising of the tissue of the brain in a “more or less linear fashion, that means there [were] lines that you could see.” There was also “evidence of a subdural hematoma, which means that there was bruising around the dura, which is secondary to a venous injury, and typically a shearing injury.” Dr. Whitefield stated that there was bleeding on the top of the brain, outside and inside. She also said next to the left frontal lobe “there was a significant midline shift. . . . [T]he brain is kind of the nut inside the shell, and so when there is swelling, [there is nowhere for the brain to go], so it pushes the brain the other way. And that’s what was described in the CAT scan.” She said that the hook shaped portion of the brain had “left to right uncus herniation,” which means “the brain pushed the left side of the brain with its swelling, pushed the right side somewhere else.” Because the brain had nowhere to go, the swelling pushed the brain through the large hole at the bottom of the skull, which causes “irreversible damage to the brain” and “posturing.”

Dr. Whitefield said that the CAT scan of the abdomen showed “low blood pressure and no volume in it. So the victim must have bled into somewhere. But [there was] no injury to the liver, pancreas or spleen and [they were] otherwise normal.” Dr. Whitefield said that Garrett was extremis, which meant that he had “hardly anywhere else to go before he . . . [died]” She said that in her opinion, based on Garrett’s condition when she treated him in the hospital, Garrett could not have

been acting normally at 10:00 a.m. that morning. Dr. Whitefield stated that the cause of Garrett's injuries was the result of "direct blows to the head that are non-accidental; and a shaking" which "are classic injuries for the battered child syndrome." She explained that the subdural hematoma was the result of "vigorous shaking . . . by an adult" and "the trauma that happens during these incidences [of vigorous shaking] is a trauma of rage, wilful and rageful, and it means nothing but harm to the child." She also determined that the "imprint" bruises on Garrett's abdomen were "non-accidental" and were not "typical toddler injuries." Dr. Whitefield stated in her report that Garrett had approximately twenty bruises of varying ages. She acknowledged that she used the term fingerprints to describe the bruises on his abdomen in her report. She said that she did not note any fractures in her report.

Patrick Keegan, M.D., a board certified pediatrician, testified as an expert in the areas of child abuse and pediatric medicine. He stated that Garrett had been at the hospital for approximately an hour before he saw him on May 21, 2004. He said that Erica told him that Garrett was brought to the hospital because he "would not wake up." Erica told him that the day before Garrett had been healthy, that they had been all day at the pool, and she thought he was sleeping late because he was tired from the day before. She said she checked on him at around midnight, changed his diaper, and that he was fine. She said that she changed his diaper again at 10:00 a.m. the next morning and that he had given her a hug and kiss and then had gone back to sleep. Erica said that she had started cooking breakfast and asked Troy to check on Garrett at around 11:00 a.m., and Troy found Garrett in his condition. Erica also told Dr. Keegan that she and Troy had been Garrett's sole caregivers during the previous forty-eight hours. Dr. Keegan said that he asked Erica, in the presence of Shawn Morris, detailed questions about the child's history. Dr. Keegan identified three photographs of Garrett that were entered into evidence. He said the first photograph depicted Garrett's eyes being held open, and he explained that the fact that Garrett's pupils did not react meant that he would not live. He stated that the second photograph depicted the bruises on Garrett's abdomen, although it did not clearly show his approximately twenty bruises. The third photograph depicted more of the bruises on Garrett's ribcage.

Dr. Keegan stated that Garrett "was shaken and beaten to death, there's no doubt. This wasn't a fall, this wasn't anything else . . . It's child abuse, homicide." He stated that the reason Garrett was posturing was "because his brain stem [was] being shoved through the only opening in his skull." He said that the blood in Garrett's brain that was not supposed to be there was caused by "violent injury, from massive trauma" indicative of child abuse or being an unrestrained passenger in a car that struck a telephone pole at the speed of fifty miles per hour. Dr. Keegan stated that the child's injury occurred on May 21, 2004. He specifically stated, "[The child's injury] didn't occur two days before, it didn't occur a week before, it had to have happened on this day." Dr. Keegan said that the test results showed that "it's possible he was injured at midnight," but that it was not possible that Garrett "was able to give [Erica Goodner] a kiss and hug at 10:00 a.m. in the morning." Dr. Keegan also stated that "there was never a concern about chlorine" with Garrett and that there was "no mention of chlorine" in the hospital record. When describing the type of force needed to cause Garrett's injuries, he explained that this was not a person bouncing a child or a person trying to aid a choking child by slapping them on the back but was "the type of shaking that if any of us saw it happen, we would call a police officer. You would know that it was child abuse. . . . This is a kind of lethal, out-of-control rage sort of thing." Dr. Keegan said that the pain that Garrett felt while this shaking was going on would be "excruciating," and "there is no way this child would not be crying loud enough

for anybody within reasonable hearing distance not to hear this.” Dr. Keegan said that as the shaking continued, the child would become unconscious. He explained that retinal hemorrhages are “tiny blood vessels that have burst,” and he stated that Garrett had “so many retinal hemorrhages . . . that I could not count them, in both eyes.” Dr. Keegan also stated that the ophthalmologist that was consulted found that Garrett also had a retinal tear, where “the retina [was] actually detached from the back of the eyeball itself. This takes a lot of force.” Dr. Keegan said that he and Dr. Marvin Hall performed separate brain death examinations on Garrett, and he was pronounced dead on May 22, 2004. He stated that the blood on top of the child’s skull discovered during his autopsy showed that “the child was not just a shaken baby, he was shaken and then thrown against something or he was hit by something or somebody.” In addition, he stated that the “knuckle prints on his abdomen told me that he had been beaten before.” He stated that he, as the treating physician, did not tell Erica that Garrett died of an aneurysm, and he could not believe any other medical personnel would tell her that either. Dr. Keegan consulted Dr. Boehm, a neurosurgeon, who concluded that Garrett had a “hopeless diagnosis.”

When Dr. Keegan told Erica about the need for a formal brain death examination, he said she got very upset and demanded that Garrett be transferred to another hospital. He explained that Erica “made these statements in a very open area . . . she did it at the desk where many people could see and hear this. It appeared to be an act as opposed to general, a sense that she was really concerned. It seemed to me to be more a demonstration or an act that she was interested.”

Dr. Keegan explained that because “[the child’s] head is relatively heavier and the neck muscles are relatively weaker [than that of an adult’s] . . . the combination of those two lets the head shake more violently.” He stated that separation in the area of Garrett’s soft spot or fontanel could have been caused by the swelling of his brain from the injuries, but “the pressure to create that separation would have to be extraordinarily high,” and he believed that the pressure was that high in this case. Dr. Keegan acknowledged that Garrett “may have been rendered incapacitated before the head blow occurred” and that the child would not have been able to cry while incapacitated. Dr. Keegan admitted that he could not testify as to the order of Garrett’s injuries or the exact time that they occurred. Although Dr. Keegan agreed that he could not determine whether Garrett had been beaten and then shaken, or vice versa, he stated that “if somebody’s punching a baby, the baby is going to be crying. So the fact this could happen with nobody responding to it, to me, is unbelievable.” Dr. Keegan said that the trauma nurse’s notes in the emergency room record stated that Garrett arrived at 12:05 p.m., his pulse, skin color, and capillary refill were normal, and Garrett’s skin temperature was warm and the pupil size was equal at that time. He also stated that he believed that the nurse’s notes in the emergency room record were not complete.

Frank King, M.D., the Hamilton County medical examiner, testified that a pathologist in his office performed Garrett’s autopsy, and the record from that autopsy stated that Garrett’s cause of death was “blunt head trauma” and the manner of death was “homicide.” Dr. King stated that blunt head trauma meant “that the head is injured by contact with or movement that involves blunt surfaces or impacts, as opposed to a sharp edge or cutting type of trauma.” He said that the child had a collection of blood on the left side between his skull and brain which is caused by an impact or by “the head having an acceleration or deceleration type movement.” He also said that the child’s skull plates had been forced apart from blunt trauma. The autopsy also showed retinal hemorrhages in both eyes which “generally occurs due to an acceleration/deceleration type movement, also called a

whiplash injury, or sometimes a shaken injury” or a “blunt trauma injury to the head, where there’s bleeding inside the skull that can sometimes extend along the optic nerves to the eyes and reach the retinas that way.” In addition, Dr. King said that Garrett had bruising on the abdomen, back, legs, arms, neck and left chest as well as bleeding around the kidneys, small bowel, bruising around the base of the lungs, and a hemorrhage around the internal abdominal areas. Dr. King explained that tissue samples taken from Garrett’s body during the autopsy showed that the contusions were one to two days old from Garrett’s time of death. Dr. King stated that “The pattern of injury here does not fit any believable or reasonable type of accident that could explain it. . . . So the pattern of injury, the type of injury present, is inflicted upon this child, and, therefore, by medical definition, it is a homicide, meaning death is caused by another person.”

Dr. King acknowledged that because Garrett remained on life support for the harvesting of his organs after he was declared brain dead, it was more difficult to determine the age of his bruises. For this reason, he said that he erred on the conservative side when determining the date of Garrett’s injuries. Dr. King stated that the contusions in Garrett’s abdomen were “consistent with a repeated poking or probing against the body” that could come from an “adult-size finger” or “any other object that would be similar size that was impacted against or poked against the child’s abdomen.” Dr. King said that the damage to Garrett’s organs could have come from blunt trauma from “something moving toward the body with some velocity” or if “there is just a compression of the abdomen . . . that just squeezes enough to where these tissues are moved and stretched and compressed and torn.” He acknowledged that there is a test to confirm shaken baby syndrome but this test was not done in Garrett’s case. He admitted that shaken baby syndrome was not listed as Garrett’s cause of death. Dr. King also acknowledged that while it was difficult to determine the age of Garrett’s bruises, the evidence was clear that these bruises were recent, rather than a week or two old. He admitted that Garrett’s head trauma could have been caused by one large blow and that the “child’s level of consciousness should drop; [the child] should become less responsive and should be noted to [have] abnormal behavior.” However, he explained that children can recover from an injury better than adults. The effect of a big blow to the head “just depends on exactly how the head moved, how the brain moved, how much injury occurred at that moment, whether this would be a rapid onset loss of consciousness or whether this would take a little longer . . . but I think in this case it should not take long for this child to obviously have a change of behavior.” Dr. King confirmed that Garrett did, in fact, receive a blow to the head.

Dr. King defined shaken baby syndrome as “a pattern of injury to a child in which the child is shaken back and forth in a manner that causes the head and the body to accelerate and decelerate out of sync.” He said that the term blunt head trauma could include injury from either an impact or shaking and that in Garrett’s case, “the pattern of injury certainly is consistent with a shaking type injury, and in addition, . . . there are impacts to the head. So in my opinion, both were present . . .” Dr. King also stated that some pathologists prefer to list the cause of death as blunt head trauma rather than shaken baby syndrome “and then spend a long time trying to argue with someone whether or not an impact occurred.” Although the contusions did not show a clear hand pattern that would be indicative of shaking a baby, an adult could have shaken the baby without leaving a contusion.

As previously stated, Troy and Erica elected not to testify. The motions for judgment of acquittal filed by the appellants were overruled by the trial court.

Sentencing Hearing. At the March 26, 2007 sentencing hearing, the trial court and attorneys

discussed the 2005 Amendment to the sentencing law:

THE COURT: Let me mention to both counsel for Mr. Goodner and Ms. Goodner, the case for which the Goodners now stand convicted occurred prior to June of 2005. As you know, the sentencing law changed in June of 2005. Have you, Mr. Little, made any determination about whether Mr. Goodner would be sentenced in the pre-2005 law or after? He has the option. Now, I will say this: While you're discussing with him, if you elect to be sentenced after the June law went into effect, he has to sign a waiver. While you're discussing it with him, maybe you can go over that with him.

Mr. Philyaw, I will give you both the same thing. These are blank waivers, but basically indicate you need to advise your client. And it's probably something you would not have done, but these events, these cases, did occur on May 21 and May 22, 2004, so that was prior to the law changing. So if you desire to be sentenced under the new laws, then you need to sign those waivers.

MR. LITTLE: Judge, Mr. Goodner is going to go under the law that was in effect at the time of the offense.

MR. PHILYAW: And so is Ms. Goodner, Your Honor.

THE COURT: So this would be the law in effect pre-June 2005, which is what they were, certainly, at the time of the offense, so it's not necessary to sign the ex post factor [waiver]. . . .

At the sentencing hearing, Shawn Morris and Pam Hammontree testified for the State. Troy Goodner, and William Coffee, a mentor, testified on Troy's behalf, but their testimony is omitted because Troy does not challenge his sentence on appeal. Gary McBryar and Charles Goodner testified on Erica's behalf.

Shawn Morris reiterated much of his testimony during trial concerning the frequency of his visitation with Garrett in the months preceding his death. He also testified that he "felt like [he] was stripped, of being a father to Garrett" He stated that after Garrett's death he began drinking excessively and thinks about Garrett "every day." Regarding the appropriate sentence for Erica and Troy, Morris said simply, "I hope justice is served today."

Pam Hammontree, Garrett's paternal grandmother, testified that she took care of Garrett frequently before Erica prevented her and Morris from seeing the child. She explained the impact that Garrett's death had on her:

The impact of this murder is every single day in every single way and with every single person that comes in contact with my other grandchildren, that I have become so, so careful and just so . . . preoccupied with their safety at every moment. That we never know, [I] just try to keep them safe, because [it] seems like you never know people, and to prevent anything like this from possibly touching our lives ever again.

And the impact is having to explain to . . . [Garrett's cousins] that were so close to Garrett, his playmates . . . he's included, still, in our lives The children include him, the children write him letters, bring him toys to the grave, and they just remember him.

Gary McBryar testified that Erica was currently working for him. He said that Erica had married a man by the name of Heath and had a son named Austin and that he had not witnessed Erica taking drugs or participating in illegal activity. He said that Garrett's death "affects [him] – I know it affects everyone, all three families sitting in here today, but I think it affects me worse . . ." Regarding Erica and Troy's relationship, he stated, "[Troy has said] that Erica does what he tells her to do."

Charles Goodner, Erica's father, testified that Erica, her husband, and her son live in the apartment below him. Goodner said that he never witnessed Erica using drugs or participating in illegal activities now or in the past. He stated that "[Garrett's death has] been hard because it was, of course, my grandson, and I saw what it did to Erica I don't think I've heard anybody wail the way she did. That hurt almost as much as losing Garrett, because she is my daughter." Goodner opined that Erica would be able to follow the terms of probation:

I see no reason at all [why Erica could not follow the terms of probation]. . . . She's there at home almost all the time, she's always with Austin. . . . Other than the times she's at work, Austin is almost always with her."

The trial court applied a total of five enhancement factors to Erica and Troy. The following enhancement factors were applied to both defendants for the reckless aggravated assault and criminally negligent homicide convictions: the defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range; the victim of the offense was particularly vulnerable because of age or physical or mental disability; and the defendant abused a position of public or private trust, or used a special skill in a manner that significantly facilitated the commission or the fulfillment of the offense.² See T.C.A. § 40-35-114(2), (5), (16) (2003). The court applied the following two enhancement factors to both defendants solely for the reckless aggravated assault conviction: the defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense; and the personal injuries inflicted upon the victim were particularly great. See T.C.A. § 40-35-114(6), (7) (2003). The court applied one mitigating factor, any other factor consistent with the purposes of this chapter, to both defendants on both convictions: the court found that Erica's strong employment history and Troy's statement of remorse at the sentencing hearing were entitled to slight weight. See T.C.A. § 40-35-113(13) (2003). The court found that the evidence did not support consecutive sentencing. With regard to alternative sentencing for Erica and Troy, the court stated the following:

In determining . . . alternative sentences . . . and probation considerations, I have considered the code sections that have previously been submitted, as well as the

²Although the transcript from the sentencing hearing does not clearly indicate whether the trial court applied this factor to the reckless aggravated assault and criminally negligent homicide convictions for both defendants, we conclude that a reasonable interpretation of this factor makes it clear that the trial court intended for this enhancement factor to be applied to both convictions.

presentence report, the facts and circumstances as I have recounted this morning, and that will be part of the record, the trial itself, as introduced by the State.

The prior criminal history, both defendants have that. Ms. Goodner has been awarded probation in the past, and even though there's no indication that she did not comply with the conditions of probation, she certainly, after receiving probation, committed the two offenses for which she now stands convicted. And it appears to me, based upon the proof, that she did, in fact, use cocaine.

The same is true with Mr. Goodner, even though his conviction for DUI occurred later, I think it's important that he had a DUI and apparent cocaine criminal behavior before, and then this case occurred and he was arrested for cocaine, and while he's out on bond he does pick up the DUI.

So I think all these considerations would dictate against probation considerations and the criminal history would be important.

Previous actions. Previous actions and character, as already indicated, I think the things I mentioned about the probation previously being granted to Ms. Goodner and the situation concerning Mr. Goodner would indicate that would have a difficult time in regard to rehabilitation. . . . Based upon what I've said, I don't know that they could comply with probation.

. . . I've already mentioned the Court's viewpoint[,] and I think what the overwhelming proof at the trial was, and I think an alternative sentence or probation would, in fact, unduly depreciate the seriousness of the offenses for which these defendants stand guilty of. I think they were horrible offenses.

The next thing, whether or not the offense[s] were particularly enormous, gross, or heinous. I think they were. . . .

But I think all of these factors consider in [sic] as to whether alternative [sentencing] is appropriate . . . or whether a sentence of probation, outright probation, is appropriate, and I find, based upon all those factors, that such is not the case.

The court sentenced Erica and Troy as Range I, standard offenders to four years for the reckless aggravated assault conviction and two years for the criminal negligent homicide conviction, to be served in the Department of Correction. The court ordered these sentences to be served concurrently, for an effective sentence of four years at thirty percent for each appellant.

ANALYSIS

I. Sufficiency of the Evidence. Both Erica and Troy Goodner argue that the evidence was insufficient for a jury to convict them of criminally negligent homicide and reckless aggravated assault. Erica Goodner contends that there was "no evidence that [she] knew or should have known of any risks to her child at the hands of Troy Goodner" and "no evidence that she did anything after [she knew of her son's injury] to support [her] convictions." Troy Goodner argues that the State "did

not eliminate all possible theories [in order] to prove [his] guilt beyond a reasonable doubt” and that “the most damaging evidence against [him] was that he was present in the apartment on the night before and the morning of May 20, 2004.” The State contends that the evidence was sufficient to convict Erica and Troy Goodner of criminally negligent homicide and reckless aggravated assault.

The State, on appeal, is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). When a defendant challenges the sufficiency of the evidence, this Court must consider “whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 442 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). Similarly, Rule 13(e) of the Tennessee Rules of Appellate Procedure states, “Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support a finding by the trier of fact of guilt beyond a reasonable doubt.” The requirement that guilt be found beyond a reasonable doubt is applicable in a case where there is direct evidence, circumstantial evidence, or a combination of the two. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990) (citing State v. Brown, 551 S.W.2d 329, 331 (Tenn. 1977) and Farmer v. State, 343 S.W.2d 895, 897 (Tenn. 1961)). The trier of fact must evaluate the credibility of the witnesses, determine the weight given to witnesses’ testimony, and must reconcile all conflicts in the evidence. State v. Odom, 923 S.W.2d 18, 23 (Tenn. 1996). When reviewing issues regarding the sufficiency of the evidence, this Court shall not “reweigh or reevaluate the evidence.” State v. Philpott, 882 S.W.2d 394, 398 (Tenn. Crim. App. 1994) (citing State v. Cabbage, 571 S.W.2d 832, 836 (Tenn. 1978), superseded by statute on other grounds as stated in State v. Barone, 852 S.W.2d 216, 218 (Tenn. 1993)). This Court has often stated that “[a] guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.” State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997) (citation omitted). A guilty verdict also “removes the presumption of innocence and replaces it with a presumption of guilt, and the defendant has the burden of illustrating why the evidence is insufficient to support the jury’s verdict.” Id. (citation omitted).

According to Tennessee Code Annotated section 39-13-212 (a) (2003), criminally negligent homicide is defined as “criminally negligent conduct that results in death.” In order to convict a defendant of criminally negligent homicide, the State must prove beyond a reasonable doubt: “(1) criminally negligent conduct on the part of the accused; (2) that proximately causes; (3) a person’s death.” State v. Farner, 66 S.W.3d 188, 199 (Tenn. 2001); see also T.C.A. § 39-13-212(a) (2003). Tennessee Code Annotated section 39-11-106(a)(4) (2003) states:

[A] person . . . acts with criminal negligence with respect to the circumstances surrounding that person’s conduct or the result of that conduct when the person ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person’s standpoint.

Proximate causation for criminally negligent homicide “is generally established in Tennessee by showing that the victim’s death was the natural and probable result of the defendant’s unlawful

conduct.” Farner, 66 S.W.3d at 202. However, “[t]he defendant’s unlawful act or omission need not be the sole or immediate cause of the victim’s death.” Id. (citing Letner v. State, 299 S.W. 1049, 1051 (Tenn. 1927)).

In order to convict a person of reckless aggravated assault, the State must prove beyond a reasonable doubt that the individual “[r]ecklessly commits an assault as defined in § 39-13-101(a)(1), and: (A) [c]auses serious bodily injury to another; or (B) [u]ses or displays a deadly weapon.” T.C.A. § 39-13-102(a)(2) (2003). Section 39-13-101(a)(1) (2003) defines assault as “intentionally, knowingly or recklessly caus[ing] bodily injury to another.”

The record reflects that the State relied upon the theory of criminal responsibility against both defendants at trial. An individual is criminally responsible for the conduct of another person if, “[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense.” T.C.A. 39-11-402(2) (2003). Criminal responsibility is not a distinct crime but “a theory by which the state may prove the defendant’s guilt based on another person’s conduct.” State v. Osborne, 251 S.W.3d 1, 16 (Tenn. Crim. App. 2007) (citing State v. Mickens, 123 S.W.3d 355, 389-90 (Tenn. Crim. App. 2003)). In the theory of criminal responsibility, “an individual’s presence and companionship with the perpetrator of a felony before and after the commission of an offense are circumstances from which his or her participation in the crime can be inferred.” State v. Watson, 227 S.W.3d 622, 639 (Tenn. Crim. App. 2006) (citing State v. Bell, 973 S.W.2d 288, 293 (Tenn. Crim. App. 1998)). In this situation, “no particular act need be shown, and the defendant need not have taken a physical part in the crime to be held criminally responsible.” Id. (citing Bell, 973 S.W.2d at 293)). In order to be held criminally responsible for the acts of another, the defendant must “in some way associate himself with the venture, act with the knowledge that an offense is to be committed, and share in the criminal intent of the principal in the first degree.” Hembree v. State, 546 S.W.2d 235, 239 (Tenn. Crim. App. 1976) (quoting Jenkins v. State, 509 S.W.2d 240, 244-45 (Tenn. Crim. App. 1974)).

Here, the medical evidence clearly showed that the victim was beaten and shaken to death. The most serious of the child’s injuries was that his brain stem was pushed through a hole in his skull, causing permanent brain damage. In addition, medical experts confirmed that the victim suffered retinal hemorrhages in both eyes from the violent shaking and had contusions on his abdomen, left chest, face, neck, arms, legs, and back.

The medical testimony was consistent in finding that the victim’s injuries were intentional, not accidental. Dr. Keegan stated that the child “was shaken and beaten to death, there’s no doubt.” Dr. Keegan opined that the child’s brain damage would have been caused by “massive trauma” indicative of child abuse. Dr. Keegan said that, given the child’s fatal injuries, it would have been impossible for the child’s condition to have been normal the morning before he was taken to the hospital, and it was possible that the child’s injuries could have occurred at midnight the night before he was admitted. Dr. Keegan also stated that the pain from the shaking that caused the child’s injuries would have been “excruciating” and would have caused the child to cry loudly enough for anyone reasonably close to hear. As the shaking continued, Dr. Keegan stated that the child would have become unconscious. He also explained that the amount of blood found on the child’s skull showed that the victim was not just a shaken baby but that he was shaken and then thrown against

something or shaken and hit by someone or something. In addition, Dr. Keegan stated that the knuckle prints on the child's abdomen indicated that he had been beaten before. Dr. Whitefield also stated that it was her opinion that the child could not have been acting normally at 10:00 a.m. the morning that he was admitted to the hospital. Dr. Whitefield stated that the child's injuries were from "direct blows to the head that [were] non-accidental" and "vigorous shaking . . . by an adult" and that the "imprint" bruises on the child's abdomen were "non-accidental" and were not "typical toddler injuries." Dr. King stated that the child's cause of death was "blunt head trauma" and that the manner of death was "homicide." Dr. King stated, "The pattern of injury here does not fit any believable or reasonable type of accident" and "the type of injury present, is inflicted upon this child, and, therefore, by medical definition . . . is a homicide." Dr. Fisher testified that the hematomas on the victim's organs were "consistent with a large amount of force" and precluded some of the organs from being used for transplantation.

Significantly, Dr. Keegan testified that the victim's injury had to have occurred on May 21, 2004. There was overwhelming testimony that the victim suffered his injuries while in the care of Erica Goodner and Troy Goodner exclusively. Erica and Troy told Det. Tilley that they had been with Garrett at their home from Thursday afternoon, May 20, to Friday morning, May 21, when they discovered the condition of the child. Erica Goodner told Dr. Keegan that she and Troy Goodner had been the child's sole caregivers during the forty-eight hours prior to the morning of May 21. Patrice Schermerhorn and Paul Swafford testified that Erica and Troy Goodner were alone with the child when they arrived in the ambulance. Caroline Pereira, the Goodner's next door neighbor, testified that between 11:30 p.m. on May 20 and midnight on May 21, she started hearing loud noises that kept her from sleeping for about twenty minutes. She stated "there was a lot of commotion" coming from the Goodner's home, and she thought it sounded like they were installing a "home theater system" and that she heard "noises that were consistent with something up against a wall."

The evidence showed that Erica and Troy Goodner gave a variety of inconsistent explanations for what happened to the child. Shawn Morris, the child's father, asked Erica Goodner at the hospital what happened to the child and she gave him "a number of different answers." Tina McBryar testified that Troy told her at the hospital that the child had swallowed chlorine and that they had to flush the toxin out of his blood. In addition, Ms. McBryar stated that the day after the child was pronounced dead, Troy told her at a family gathering, "I know how the police system works, they're going to come to me and tell me that – they're going to come to Erica and tell Erica that I beat her son to death and they're going to tell me that Erica said I beat her son to death." Mary Cooke also testified that Troy told her that the child had swallowed too much pool water and had chlorine in his system. Cooke also said that Erica told her at the funeral home that law enforcement was investigating the McBryars for accidents that the child had while in their care. Kevin Billingsly testified that Troy Goodner told him that the child had an aneurysm and died over the weekend.

During trial, each defendant- appellant tried to convince the jury that the other defendant was responsible for the child's fatal injuries. However, the jury was instructed on the theory of criminal responsibility, wherein the State proves a defendant's guilt based on another person's conduct. See State v. Osborne, 251 S.W.3d 1, 16 (Tenn. Crim. App. 2007) (citing State v. Mickens, 123 S.W.3d 355, 389-90 (Tenn. Crim. App. 2003)). We conclude that the evidence was more than sufficient to convict both Erica Goodner and Troy Goodner of reckless aggravated assault and criminally

negligent homicide.

II. Admission of Three Photographs of the Victim in the Hospital. Troy Goodner argues that the trial court erred in allowing the State to admit into evidence three photographs of the deceased victim's body in the hospital. The trial court has discretion regarding the admissibility of photographs, and a ruling on this issue "will not be overturned on appeal except upon a clear showing of abuse of discretion." State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978). First, a photograph must be "verified and authenticated by a witness with knowledge of the facts" before it can be admitted into evidence. Id. Second, a photograph must be relevant to an issue that the jury must determine before it may be admitted. State v. Vann, 976 S.W.2d 93, 102 (Tenn. 1998), cert. denied, 526 U.S. 1071, 119 S. Ct. 1467 (1999) (citations omitted). However, if the photograph's "prejudicial effect outweighs its probative value," it should not be admitted. See Tenn. R. Evid. 401 and 403; Banks, 564 S.W.2d at 951. A relevant photograph "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." See Banks, 564 S.W.2d at 951. Unfair prejudice has been defined by the Tennessee Supreme Court as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily an emotional one." Id. Photographs must never be used "solely to inflame the jury and prejudice them against the defendant." Id.

During Inv. Mardis' testimony at trial, the State attempted to introduce three photographs of the victim taken at the hospital. Troy Goodner's attorney objected. During a hearing conducted outside the presence of the jury, Inv. Mardis identified the three photographs that he took of the victim at the hospital on March 21, 2004. The three photographs depicted the victim's entire body in a hospital bed, his abdomen area, and his face, with his eyes pulled open. Investigator Mardis identified bruises on the victim's abdomen, stomach, and thigh from the first two photographs. He also stated that the third photograph of the victim's eyes was for the purpose of showing the reddening of the eyes. The State argued that the photographs showed a pattern of bruising on the victim's body, which would be difficult for the jury to visualize without a photograph. In addition, the State argued that the photograph of the child's eyes showed a red cloud indicative of retinal hemorrhaging. Troy Goodner's attorney objected³ again, arguing that the photographs would inflame the jury, that their highly prejudicial nature outweighed their probative value, and that Inv. Mardis was not a medical expert qualified to testify about these pictures. The State responded that the photographs were necessary to show the condition of the victim. The trial court overruled the objection, stating:

The severity of the injury and whether or not a crime took place I think is the reason we're here. It has great probative value. I don't see, I'll disagree with counsel for the defense, any prejudicial effect at all. The probative value . . . is to prove . . . the severity of the injuries or lack of severity of the injuries. And the fact that the child was being treated in the hospital, I think, has very little prejudice here.

³Although Erica Goodner's attorney also objected to these three photographs, she did not raise this issue on appeal.

Now, as I will agree with the defense, this officer can only testify as to what he saw and the fact that he took the pictures, but I think there is probative value as to what the child looked like So the Court will allow these [three photographs] to show what the child appeared to have as far as bruising

The court allowed the photographs to be marked for identification purposes during Inv. Mardis' testimony with the understanding that the State would ask that they be admitted later through one of their medical experts.

The State attempted to enter the three photographs into evidence and publish them to the jury during Dr. Patrick Keegan's testimony. Troy Goodner's attorney objected again to the admission of the three photographs. The Court ruled, "I am going to allow [these three photographs to be admitted], I think the probative value is important based upon [Dr. Keegan's testimony], and I don't see anything unduly prejudicial about those three pictures, so I'll overrule the objection."

We conclude that the trial court properly admitted the three photographs of the victim at the hospital. The photographs were relevant to show the child's precise physical condition on the day that he was admitted to the hospital for his injuries. Additionally, the photographs helped the jury visualize and understand the child's condition in a way that would be impossible through testimony alone. There is nothing gruesome, graphic, or horrifying about these pictures. Compare State v. Banks, 564 S.W.2d 947, 950-951 (Tenn. 1978) (citing People v. Jenko, 410 Ill. 478, 102 N.E.2d 783 (1951)) ("[P]hotographs of [a] corpse are admissible in murder prosecutions if they are relevant to the issues on trial, notwithstanding their gruesome and horrifying character."). Furthermore, nothing in the photographs would confuse or mislead the jury, waste the court's time, or be redundant. See Tenn. R. Evid. 403; see also Banks, 564 S.W.2d at 951. Although the photographs depicted a child that the jury knew was deceased, the probative value of all three photographs outweighed any unfair prejudice to Troy Goodner. We conclude that the trial court did not abuse its discretion in admitting these photographs.

III. Alleged Prosecutorial Misconduct During Closing Arguments. Troy Goodner also claims "the prosecutor engaged in misconduct during closing argument by implying that a unanimous verdict was not required as to each [of the defendants] in order to find both defendants guilty." In addition, Troy argues that the prosecutor's closing argument "suggests to the jury to ignore reasonable doubt" and "[t]hat it is proper to find both defendants guilty even if some of the jury has doubt as to one of the defendants." In response, the State argues that Troy has not shown that any alleged misconduct on the part of the prosecutor negatively affected his trial.

Specifically, Troy claims that the following statements of the prosecutor were improper:

Now, when you read the jury charge, it will tell you that you must find either they committed this crime or that they were criminally responsible. Read through that statute. You don't have to decide which one committed this crime and which one is criminally responsible, or which one committed this crime and which one is

criminally responsible, you just have to decide that they did one or the other. And you'll see it in the jury charge, you don't have to. Because some of you might believe that Mr. Goodner did it, and some might believe that they both did it. If you all believe that way, then you can find the defendants guilty. And you'll see that in the charge, you'll be able to read that for yourself what I just explained.

The courts of this state have routinely noted that "closing argument is a valuable privilege that should not be unduly restricted." State v. Bane, 57 S.W.3d 411, 425 (Tenn. 2001). The trial court has substantial discretion in controlling the course of arguments and will not be reversed unless there is an abuse of that discretion. Id. (citing Terry v. State, 46 S.W.3d 147, 156 (Tenn. 2001)). In addition, prosecutorial misconduct does not constitute reversible error absent a showing that it has affected the outcome of the trial to the prejudice of the defendant. Id. (citing State v. Chalmers, 28 S.W.3d 913, 917 (Tenn. 2000)). However, an attorney's comments during closing argument "must be temperate, must be predicated on evidence introduced during the trial of the case, and must be pertinent to the issues being tried." State v. Gann, 251 S.W.3d 446, 459 (Tenn. Crim. App. 2007) (citing State v. Sutton, 562 S.W.2d 820, 823 (Tenn. 1978)). In order to be entitled to relief on appeal, the defendant must "show that the argument of the prosecutor was so inflammatory or the conduct so improper that it affected the verdict to his detriment." State v. Farmer, 927 S.W.2d 582, 591 (Tenn. Crim. App. 1996). This court must consider the following factors when determining whether the argument of the prosecutor was so inflammatory or improper to negatively affect the verdict: (1) the conduct complained of viewed in context and in light of the facts and circumstances of the case; (2) the curative measures undertaken by the court and the prosecution; (3) the intent of the prosecutor in making the improper arguments; (4) the cumulative effect of the improper conduct and any other errors in the record; and (5) the relative strength and weakness of the case. Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976).

In this case, the trial court issued the following curative instruction to the jury: "Members of the jury, once again, these are summations, these are theories, these are arguments that you are hearing. Remember the facts as you heard them and the court will give you the law to apply to those facts when the summations and arguments are over." During the jury instructions, the trial court read the following charge defining criminal responsibility:

Criminal responsibility for the conduct of another. A defendant is criminally responsible as a party to an offense if the offense was committed by the defendant's own conduct, by the conduct of another for which the defendant is criminally responsible, or by both. Each party to the offense may be charged with the commission of the offense. A defendant is criminally responsible for an offense committed by the conduct of another if having a duty imposed by law or voluntarily undertaken to prevent commission of the offense and acting with intent to benefit in the proceeds or results of the offense, or to promote or assist its commission, the defendant fails to make reasonable effort to prevent commission of the offense. Before you find a defendant guilty of being criminally responsible for said offense committed by the conduct of another, you must find that all the essential elements of said offenses have been proved by the state beyond a reasonable doubt.

As we have stated, criminal responsibility is not a distinct crime but “a theory by which the state may prove the defendant’s guilt based on another person’s conduct.” State v. Osborne, 251 S.W.3d 1, 16 (Tenn. Crim. App. 2007) (citing State v. Mickens, 123 S.W.3d 355, 389-90 (Tenn. Crim. App. 2003)). Additionally, there is no requirement that the State “elect between prosecution as a principal actor and prosecution for criminal responsibility.” State v. Hodges, 7 S.W.3d 609, 625 (Tenn. Crim. App. 1998) (citing State v. Williams, 920 S.W.2d 247, 257-58 (Tenn. Crim. App. 1995)).

The trial court instructed the jury regarding criminal responsibility and we must presume that the jury followed this instruction. See State v. Shaw, 37 S.W.3d 900, 904 (Tenn. 2001) (holding there is a presumption that the jury follows curative instructions). In addition, the trial court read the charge defining criminal responsibility to the jury before deliberations. Finally, Troy Goodner failed to show that the prosecution’s remarks detrimentally affected the jury’s verdict. Therefore, we conclude that any alleged prosecutorial misconduct did not effect the outcome of the trial.

IV. Erica’s Four Year Sentence in Confinement. On appeal, we must review issues regarding the length and manner of service of a sentence de novo with a presumption that the trial court’s determinations are correct. T.C.A. § 40-35-401(d) (2003). Nevertheless, “the presumption of correctness which accompanies the trial court’s action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The defendant, not the State, has the burden of showing the impropriety of the sentence. T.C.A. § 40-35-401(d) (2003), Sentencing Commission Comments. Because the trial court in this case properly considered the sentencing principles and all relevant facts and circumstances, our review is de novo with a presumption of correctness. See Ashby, 823 S.W.2d at 169.

Any sentence that does not involve complete confinement is an alternative sentence. See generally State v. Fields, 40 S.W.3d 435 (Tenn. 2001). A trial court, when sentencing a defendant or determining alternative sentencing, must consider the following:

- (1) The evidence, if any, received at the trial and the sentencing hearing;
- (2) The presentence report;
- (3) The principles of sentencing and arguments as to sentencing alternatives;
- (4) The nature and characteristics of the criminal conduct involved;
- (5) Evidence and information offered by the parties on the mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114; and
- (6) Any statement the defendant wishes to make in the defendant’s own behalf about sentencing.

T.C.A. § 40-35-210(b) (2003); see also State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002); State v. Osborne, 251 S.W.3d 1, 24 (Tenn. Crim. App. 2007).

_____ **A. Length of Sentence.** Erica argues that the length of her sentence is excessive.⁴ The State contends that the trial court properly enhanced her sentences to the maximum within the range. The sentencing hearing transcript shows that Erica and Troy Goodner were sentenced under the pre-2005 sentencing act. Although the date of the offenses was May 21, 2004, Erica Goodner was not sentenced until March 27, 2007. If Erica Goodner had chosen to be governed by the 2005 amendments to the Sentencing Act, she could have executed a waiver of her ex post facto rights. However, because the transcript from the sentencing hearing clearly shows that she elected not to execute this waiver, her sentence in this case is governed by the pre-2005 sentencing act.

_____ The pre-2005 sentencing act required the trial court to begin its determination of the appropriate sentence with a “presumptive sentence.” T.C.A. § 40-35-210(c) (2003). For Class A felonies, the presumptive sentence was the midpoint of the appropriate range for the offense. Id. For Class B, C, D, and E felonies, this presumptive sentence was the minimum in the appropriate range for the offense. Id. After the trial court established the presumptive sentence, the court was required to enhance the sentence within the appropriate range based on the existence of the relevant enhancement factors and was required to decrease the sentence based on the existence of the relevant mitigating factors. T.C.A. § 40-35-210(d), (e) (2003). In the pre-2005 sentencing act, the trial court was granted discretion in determining the weight given to any enhancement or mitigating factor as long as the trial court followed the provisions of the Sentencing Act and supported its findings by the record. State v. Souder, 105 S.W.3d 602, 606 (Tenn. Crim. App. 2002). The only limitation on the trial court’s discretion was that the enhancement factors (1) must be “appropriate for the offense” and (2) not “essential elements of the offense.” See T.C.A. § 40-35-114 (2003). Facts supporting enhancement factors in the trial court need only be proven by a preponderance of the evidence. State v. Winfield, 23 S.W.3d 279, 283 (Tenn. 2000).

In this case, both defendants were sentenced as Range I, standard offenders. For reckless aggravated assault, a Class D felony, the sentence range is two to four years. See T.C.A. § 40-35-112(a)(4) (2003). For criminally negligent homicide, a Class E felony, the sentence range is one to two years. See T.C.A. § 40-35-112(a)(5) (2003). The trial court imposed the maximum concurrent sentence for each of the offenses for which Erica Goodner was convicted, which resulted in an effective four year sentence.

The trial court applied five enhancement factors in sentencing Erica Goodner. The court applied the following three enhancement factors to both convictions:

- (2) The defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range;
- (5) A victim of the offense was particularly vulnerable because of age or physical or mental disability;
- (16) The defendant abused a position of public or private trust, or used a special skill

⁴ Our later discussion on merger notwithstanding, we are not inclined to disturb the trial court’s judgment for Troy Goodner because he does not challenge his sentence in any way on appeal.

in a manner that significantly facilitated the commission or the fulfillment of the offense.

See T.C.A. § 40-35-114(2), (5), (16) (2003). The court applied the following two enhancement factors to the reckless aggravated assault conviction only:

(6) The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense;

(7) The personal injuries inflicted upon . . . the victim [were] particularly great.

See T.C.A. § 40-35-114(6), (7) (2003).

The court gave only slight weight to enhancement factor (2) because Erica Goodner had one misdemeanor shoplifting conviction. However, in its ruling, the court stated that the shoplifting conviction was a “crime of dishonesty” for which she received probation. The trial court also considered Erica Goodner’s cocaine use, to which Troy Goodner testified during the sentencing hearing. The court did not explain what degree of weight it gave to the other enhancement factors it applied. The State concedes, and we agree, that the trial court erroneously applied enhancement factor (7), “[t]he personal injuries inflicted upon . . . the victim [were] particularly great.” See T.C.A. § 40-35-114(7) (2003). We note that Count 2 of the indictment stated that “Erica D. Goodner . . . did unlawfully and knowingly, other than by accidental means, treat Garrett Adam Goodner . . . in such a manner as to inflict serious bodily injury, in violation of Tennessee Code Annotated 39-15-402.” We conclude that enhancement factor (7) was erroneously applied because the trial court did not realize that “serious bodily injury” is an essential element of reckless aggravated assault under Tennessee Code Annotated section 39-13-102(a)(1)(A) (2003). See *State v. Jones*, 883 S.W.2d 597, 602 (Tenn. 1994) (holding that “proof of serious bodily injury will always constitute proof of particularly great injury”).

The court applied one mitigating factor to Erica Goodner’s sentences for both convictions; it found that Erica’s strong employment history was entitled to slight weight. See T.C.A. § 40-35-113(13) (2003). In her brief, Erica does not assert that the trial court was incorrect in applying this mitigating factor.

On June 24, 2004, the United States Supreme Court held in *Blakely v. Washington* that “other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Blakely v. Washington*, 542 U.S. 296, 301, 124 S.Ct. 2531, 2536 (2004) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000)). On April 15, 2005, the Tennessee Supreme Court held that the Tennessee Criminal Sentencing Reform Act of 1989 did not violate a defendant’s Sixth Amendment right to a jury trial. See *State v. Gomez*, 163 S.W.3d 632, 654-61 (Tenn. 2005) (“*Gomez I*”), vacated and remanded, *Gomez v. Tennessee*, - U.S.-, 127 S.Ct. 1209, 167 L.Ed.2d 36 (Feb. 20, 2007). However, the Tennessee legislature passed a new sentencing law

eradicating presumptive sentences and establishing advisory sentencing guidelines which became effective on June 7, 2005. On January 22, 2007, the United States Supreme Court held that California's sentencing laws, which were very similar to Tennessee's pre-2005 sentencing act, violated the Sixth Amendment right to a jury trial, based on Blakely. See Cunningham v. California, 549 U.S. 270, —, 127 S.Ct. 856, 859 (2007). Consequently, on October 9, 2007, the Tennessee Supreme Court held that a defendant's Sixth Amendment right to a jury trial is violated when a trial court enhances a defendant's sentence using factors that were not found by a jury beyond a reasonable doubt. State v. Gomez, 239 S.W.3d 733, 740 (Tenn. 2007) ("Gomez II") (citing Cunningham v. California, 549 U.S. 270, —, 127 S.Ct. 856, 860 (2007)). Recently, this court concluded that "[t]he presumptive sentence may be exceeded without the participation of a jury only when the defendant has a prior conviction and/or when an otherwise applicable enhancement factor was reflected in the jury's verdict or was admitted by the defendant." State v. Blackburn, No. W2007-00061-CCA-R3-CD, 2008 WL 2368909, at *14 (Tenn. Crim. App., at Jackson, June 10, 2008).

Erica Goodner did not raise any Sixth Amendment issues regarding the enhancement factors at her sentencing hearing on March 26, 2007, or on appeal.⁵ In her brief, she makes only the general claim that the trial court gave her a greater sentence than was necessary to achieve the sentencing goals. Because Erica Goodner failed to raise a Sixth Amendment issue at her sentencing hearing or on appeal, she is not entitled to plenary review. Instead, we can only review this issue for plain error. See Tenn. R. Crim. P. 52(b). "It is the accused's burden to persuade an appellate court that the trial court committed plain error." State v. Bledsoe, 226 S.W.3d 349, 355 (Tenn. 2007) (citing United States v. Olano, 507 U.S. 725, 734, 113 S.Ct. 1770 (1993)). In Adkisson, this court stated that in order for an error to be considered plain:

- (a) the record must clearly establish what occurred in the trial court;
- (b) a clear and unequivocal rule of law must have been breached;
- (c) a substantial right of the accused must have been adversely affected;
- (d) the accused did not waive the issue for tactical reasons; and
- (e) consideration of the error is "necessary to do substantial justice."

State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994) (citations omitted).

As to factor (a), we find that the record includes the presentence report, technical record, and transcripts from the trial and sentencing hearing, which make it clear that the trial court enhanced Erica Goodner's sentence from the presumptive sentence of two years to four years for the reckless aggravated assault conviction and from the presumptive sentence of one year to two years for the criminal negligent homicide conviction. We conclude that the record is sufficiently clear for our review. As to factor (b), a clear and unequivocal rule of law has been breached because the trial court applied enhancement factors in contravention of Blakely. As to factor (c), because the trial

⁵Erica Goodner was sentenced on March 26, 2007. At the time of her sentencing hearing, Gomez I was the law in Tennessee. The Tennessee Supreme Court did not decide Gomez II until October 9, 2007.

court applied several factors that were not found by a jury beyond reasonable doubt, the defendant's substantial Sixth Amendment right to a trial by jury was adversely affected. Factor (d), whether the accused has waived the issue for tactical reasons, is a more difficult question. However, given the uncertainty of the law while Erica's case was pending, we cannot conclude that she waived this issue for tactical reasons.

As for factor (e), we are required to consider what sentence we would impose against Erica Goodner using the acceptable enhancement factor of her prior criminal record to determine whether the trial court's erroneous application of the other enhancement factors kept her from receiving substantial justice. See State v. Gomez, 239 S.W.3d at 743 ("Gomez II"). Erica Goodner's only prior conviction was for shoplifting, a misdemeanor. At the sentencing hearing, the trial court referred to the prior shoplifting conviction as a "crime of dishonesty." In her brief, Erica Goodner claims that she pled guilty on the shoplifting charge "without the aid of counsel" and "under peer pressure." Regardless of the circumstances, it was not improper for the trial court to enhance Erica Goodner's sentence based upon her prior misdemeanor conviction for shoplifting. In addition, we must consider the trial court's application of mitigating factors in this case. Here, the trial court found that Erica's strong employment history was a mitigating factor but gave it only slight weight, which we conclude was proper. As we have noted, the trial court imposed maximum concurrent sentences in Erica Goodner's case, which resulted in an effective four year sentence. However, when we balance the Blakely-compliant enhancement factor of her prior conviction against the slight mitigating factor of her strong work history, we conclude that Erica Goodner's sentence for reckless aggravated assault should be modified to an effective sentence of three years in order to do substantial justice.

B. Merger. Because Erica and Troy Goodner were convicted of the lesser offenses of reckless aggravated assault and criminally negligent homicide, we are compelled to consider whether convictions for these two offenses rise to the level of plain error because they violate double jeopardy protections. We find it problematic that the appellant-defendants could be found guilty of both criminally negligent homicide and reckless aggravated assault that caused the victim's death when the proof at trial and the State's final argument theorized that the victim's injuries stemmed from a single incident or assault. We note that had Erica and Troy Goodner been convicted of the indicted offenses of felony murder and aggravated child abuse, there would be no violations of double jeopardy protections and convictions for both of these offenses would be acceptable.⁶

⁶In State v. Godsey, the Tennessee Supreme Court held that convictions for felony murder and aggravated child abuse were acceptable:

[P]erhaps most importantly, this Court's decision in Blackburn, permitting dual convictions for felony murder and the underlying felony in the absence of a clearly expressed legislative intent to the contrary, was rendered in 1985. The General Assembly is presumed to know the state of the law at the time it acts. See, e.g., Washington v. Robertson County, 29 S.W.3d 466, 473 (Tenn. 2000). Therefore, when the General Assembly amended the felony murder statute in 1995 to add aggravated child abuse to the list of felonies capable of supporting a felony murder conviction, the General Assembly is presumed to have known that dual convictions for felony murder and aggravated child abuse would be permissible in the absence of a clear intent to the contrary. Although the General Assembly specifically designated child abuse and neglect a lesser included offense of homicide, there is no similar designation for aggravated child abuse. Indeed, we have evaluated the relevant statutes

In conducting our plain error analysis, we must apply the five factors previously mentioned from Adkisson, *supra*, at 641-642. As to factor (a), we find the record sufficiently clear regarding what happened in the trial court regarding the two convictions. As to factor (b), we find that a clear and unequivocal rule of law was breached because Erica and Troy Goodner received two punishments for the same offense. *See State v. Denton*, 938 S.W.2d 373, 378 (Tenn. 1996) (citations omitted). As to factor (c), we find that Erica and Troy Goodner's substantial right to double jeopardy protection was adversely affected. As to factor (d), the record does not indicate that double jeopardy protections were waived for tactical reasons. As to factor (e), we conclude that consideration of a violation of Erica and Troy Goodner's double jeopardy protections, is "necessary to do substantial justice." *See Adkisson*, 899 S.W.2d at 641-42.

Given that we have concluded that it was plain error for Erica and Troy Goodner to be convicted of reckless aggravated assault and criminally negligent homicide arising from the same set of facts, we must now analyze whether these convictions constitute multiple punishments for the same offense in violation of the double jeopardy clauses of both the United States and Tennessee Constitutions. U.S. Const. amend. V; Tenn. Const. art. I, § 10. The seminal Tennessee case for determining whether a defendant has received multiple punishments for the same offense is *State v. Denton*, 938 S.W.2d 373 (1996). In *Denton*, our Supreme Court recognized this area of double jeopardy law as "presenting courts with the greatest challenge" and outlined the double jeopardy principles to be considered when reviewing this issue. To ensure that a defendant has not been twice punished for the same offense, *Denton* requires reviewing courts to engage in the following:

- (1) a Blockburger analysis of the statutory offenses;
- (2) an analysis, guided by the principles of Duchac, of the evidence used to prove the offenses;
- (3) a consideration of whether there were multiple victims or discrete acts; and
- (4) a comparison of the purposes of the respective statutes.

Id. at 381. The court noted that "[n]one of these steps is determinative; rather the results of each must be weighed and considered in relation to each other." *Id.*; *see also Cable v. Clemmons*, 36 S.W.3d 39, 42 (Tenn. 2001).

and find no clearly expressed legislative intent to prohibit dual convictions. As previously stated, the key issue in multiple punishment cases is legislative intent. *Denton*, 938 S.W.2d at 379. Where the Legislature has indicated that cumulative punishment is intended, the double jeopardy analysis need not proceed any further. *Id.*, 938 S.W.2d at 379, n. 14. In this case, reading the child abuse and neglect, aggravated child abuse, and felony murder statutes together, we conclude that the legislative intent to allow cumulative punishment is clear. Therefore, we hold that aggravated child abuse is not a lesser included offense of felony murder and that dual convictions are permissible in this context. Accordingly, the judgment of the Court of Criminal Appeals vacating the defendant's aggravated child abuse conviction is reversed and the judgment of the trial court is reinstated.

State v. Godsey, 60 S.W.3d 759, 778 (Tenn. 2001).

The first step in the analysis is directed by the test articulated in Blockburger v. United States:

[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact that the other does not.

Blockburger, 284 U.S. 299, 304, 52 S.Ct. 180 (1932); Denton, 938 S.W.2d at 379. Thus, we must first compare the statutory elements of criminally negligent homicide and reckless aggravated assault. Criminally negligent homicide is defined as criminally negligent conduct which results in death whereas reckless aggravated assault occurs when a person recklessly causes serious bodily injury to another. T. C. A. § 39-13-212; §39-13-102(a)(2) (2005). Criminally negligent homicide requires a death, but reckless aggravated assault does not. Reckless aggravated assault occurs when the accused recklessly causes serious bodily injury to another. See Tenn. Code Ann. § 39-13-102(a)(2)(A). “Reckless” refers to a person who acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person’s standpoint. Id. § 39-11-302(c). Reckless aggravated assault requires the accused to be aware of but consciously disregard a substantial and unjustifiable risk, while criminally negligent homicide does not. Each offense requires proof of an additional fact that the other does not. See e.g. Goodwin, 143 S.W.3d 771, 782. As such, it is clear that the legislature contemplated that an individual could be convicted of both criminally negligent homicide and reckless aggravated assault on the same set of facts. Thus, under Blockburger, Erica and Troy Goodner’s dual convictions would not violate the constitutional prohibitions against double jeopardy. However, our analysis does not end here.

Step two of the analysis directs the reviewing court to also determine “the identity of the offense” or to apply what has been called the “same evidence” test. Duchac v. State, 505 S.W.2d 237, 239 (Tenn. 1973) (citing Harris v. State, 206 Tenn. 276, 332 S.W.2d 675 (1960); Eager v. State, 205 Tenn. 156, 325 S.W.2d 815 (1959)). This test states, in pertinent part, that:

A defendant has been in jeopardy if on the first charge he could have been convicted of the offense charged in the second proceeding. One test of identity of offenses is whether the same evidence is required to prove them. If the same evidence is not required, then the fact that both charges relate to, and grow out of, one transaction, does not make a single offense where two are defined by the statutes. If there was one act, one intent, and one volition, and the defendant has been tried on a charge based on that act, intent, and volition, no subsequent charge can be based thereon, but there is no identity of offenses if on the trial of one offense proof of some fact is required that is not

necessary to be proved in the trial of the other, although some of the same acts may necessarily be proved in the trial of each.

Duchac v. State, 505 S.W.2d 237, 239 (Tenn. 1973) (quoting 21 Am. Jur. 2d Criminal Law, s 82.).

In order to prove that Erica and Troy Goodner committed criminally negligent homicide, the state had to show that a death resulted from their conduct. As more fully developed previously in this opinion, the state's proof consisted largely of medical evidence that the victim "was shaken and beaten to death . . ." A medical expert concluded the victim's death was caused by "violent injury, from massive trauma" indicative of child abuse. The medical expert further explained "[The child's injury] didn't occur two days before, it didn't occur a week before, it had to have happened on this day." The state's proof further showed that (1) the defendants were the only persons with access to the victim at the time of death; and (2) a neighbor heard loud banging noises up against the wall when the victim was alleged to have been sleeping. On this record, we cannot distinguish the proof upon which the state relied to prove reckless aggravated assault from that of criminally negligent homicide. Thus, step two of the analysis shows that Erica and Troy Goodner's dual convictions violate principles of double jeopardy.

In the next steps, we must analyze whether there was more than one victim and whether the State relied on more than one discrete act in proving the charged offenses. Here, the same victim was listed in the indictments for both criminally negligent homicide and reckless aggravated assault. The State's proof also demonstrated that Garrett Goodner was the only victim in this case. Additionally, the State's case relied upon one discrete act because the medical expert testified that the injury which caused the victim's death "had to have happened on [the date charged in the indictment]." Finally, under step four, we recognize that the purpose behind both statutes is to protect people from assaultive-type conduct.

Because the same evidence was used to prove the offenses, the offenses involve the same victim, the evidence presented involved one distinct criminal act, and the statutes share the same purpose, we conclude that Erica and Troy Goodner's dual convictions for reckless aggravated assault and criminally negligent homicide violate the principles of double jeopardy. "Where commission of one crime necessarily involves commission of the second, the offense so involved is said to be merged in the offense of which it is a part. . . . [T]he doctrine of merger does not apply where the offenses are separate and distinct, but only where the identical criminal acts constitute both offenses." 21 Am. Jur. 2d Criminal Law § 21 (1998) (citations omitted); see also State v. Robertson, No. W1999-01872-CCA-R3-CD, 2000 WL 1863511 (Tenn. Crim. App., at Jackson, December 1, 2000). We, therefore, merge the criminally negligent homicide conviction into the conviction for reckless aggravated assault for Erica and Troy Goodner.

C. Denial of Alternative Sentencing. Erica Goodner also makes several arguments in favor of her receiving an alternative sentence. First, she argues that she is entitled to the statutory presumption in favor of an alternative sentence because she was convicted of Class D and E felonies. See T.C.A. § 40-35-102(6) (2003). Second, Erica contends that she should not have been given

confinement because she did not have an extensive criminal history. See T.C.A. § 40-35-103(1)(A) (2003). Third, Erica contends that confinement was not proper in her case because the crime was not especially horrible or shocking and because deterrence is less effective for crimes stemming from negligent behavior. See T.C.A. § 40-35-103(1)(B) (2003). Regarding this issue, she states that although the law previously required confinement when the offense resulted in death, State v. Bingham changed the law in Tennessee by concluding that offenses resulting in death do not preclude a sentence of probation per se and required that an offense must be “especially . . . horrifying [or] shocking” to deny alternative sentencing. See State v. Bingham, 910 S.W.2d 448, 454 (Tenn. Crim. App. 1995), overruled on other grounds by State v. Hooper, 29 S.W.3d 1 (Tenn. 2000)). In addition, regarding the deterrence factor, she cites Hooper for the proposition that “[c]ommon sense tells us that we may have less ability to deter crimes which are the result of provocation, sudden and extreme passion, or even negligent behavior, irrespective of whether others who commit similar crimes are incarcerated or given probation.” State v. Hooper, 29 S.W.3d 1, 11 (Tenn. 2000) (emphasis added). Fourth, she argues that because she has never been on probation, “measures less restrictive than confinement” have never been unsuccessfully applied to her. See T.C.A. § 40-35-103(1)(C) (2003). Fifth, Erica argues that no evidence showed that she was not a good candidate for rehabilitation. See T.C.A. § 40-35-103(5) (2003). Instead, Erica asserts that the evidence presented was that she had family support, had a history of employment and good citizenship, had turned herself in, talked to police openly, met with prosecutors, and abided by her bond conditions for two years, all of which supported an alternative sentence. In response, the State contends that the trial court’s denial of alternative sentence, on the basis that confinement had previously been applied to her unsuccessfully and that an alternative sentence would depreciate the seriousness of Erica Goodner’s offense, was proper.

Tennessee Code Annotated section 40-35-102(5) (2003) gives courts guidance about the types of individuals who should be required to serve their sentence in confinement:

In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure to past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration[.]

Erica Goodner contends that because she was convicted of Class D and E felonies, she is presumed to be a favorable candidate for alternative sentencing under Tennessee Code Annotated section 40-35-102(6) (2003), which states that a defendant who does not require confinement under subsection (5) and “who is an especially mitigated or standard offender convicted of a Class C, D, or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary.” However, “the trial court’s determination of whether the defendant is entitled to an alternative sentence and whether the defendant is a suitable candidate for full probation are different inquiries with different burdens of proof.” State v. Boggs, 932 S.W.2d 467,477 (Tenn. Crim. App. 1996). In situations where, as here, the defendant is entitled to the statutory presumption of alternative sentencing, the State has the burden of overcoming this presumption with evidence to the contrary. State v. Bingham, 910 S.W.2d 448,454 (Tenn. Crim.

App. 1995), overruled on other grounds by State v. Hooper, 29 S.W.3d 1, 9 (Tenn. 2000).

In determining whether to deny alternative sentencing and impose a sentence of total confinement, the trial court must consider if:

- (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
- (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
- (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

T.C.A. § 40-35-103(1)(A)-(C) (2003). See also Ashby, 823 S.W.2d at 169.

Although the defendant is entitled to the statutory presumption in favor of alternative sentencing, the defendant is not entitled to a presumption in favor of full probation. “[T]he burden of establishing suitability for probation rests with the defendant.” T.C.A. § 40-35-303(b) (2003). In other words, “the defendant is not automatically entitled to probation as a matter of law.” T.C.A. § 40-35-303(b) (2003), Sentencing Commission Comments. In order to meet the burden for establishing suitability for probation, the defendant “must demonstrate that probation will ‘subserve the ends of justice and the best interest of both the public and the defendant.’” State v. Bingham, 910 S.W.2d 448, 456 (Tenn. Crim. App. 1995) (quoting State v. Dykes, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990)), overruled on other grounds by State v. Hooper, 29 S.W.3d 1, 9 (Tenn. 2000). In light of her prior conviction and her lack of remorse, we conclude that Erica failed to carry the burden regarding her suitability for full probation.

Here, the trial court found that Erica Goodner was not entitled to an alternative sentence. The Court stated that she had been awarded probation in the past, and although there was no indication that she did not comply with the conditions of that probation, she was convicted of the two crimes in the instant case following this probation. The trial judge also stated that the prior probation “would indicate [that Erica Goodner] would have a difficult time in regard to rehabilitation.” He also noted that the proof indicated that she used cocaine. Ultimately, the trial court found that measures less restrictive than confinement had recently been applied unsuccessfully to Erica Goodner. See T.C.A. § 40-35-103(1)(C) (2003). We disagree with the trial court’s reasoning that any offense after an expired probation term requires application of this factor; however, we conclude that alternative relief was properly denied on other grounds.

_____The trial court also imposed a sentence of confinement in Erica Goodner’s case because it held that an alternative sentence would depreciate the seriousness of Erica Goodner’s conviction. See T.C.A. § 40-35-103(1)(B) (2003). The court stated the following:

[T]he overwhelming proof at trial was . . . [that an] alternative sentence or probation would, in fact, unduly depreciate the seriousness of the offenses for which [Erica Goodner] stand[s] guilty of. I think they are horrible offenses.

The next thing, whether or not the offense[s] were particularly enormous, gross or heinous. I think they were. . . .

The court found that the victim was vulnerable because of his age. The court also found that the “overwhelming” medical proof was that the child would have been in excruciating pain from his abdominal injuries and probably would have been unconscious after receiving the blows to his head. The Court held that Erica Goodner, as the victim’s mother, had a responsibility to protect her son. The court found that the “overwhelming uncontradicted testimony or evidence presented at this trial was that this child was beaten and shaken to death” and “the severity of the beatings” prevented his organs from being used by others in need. The Court noted that Erica and Troy Goodner were unemotional regarding Garrett’s condition upon the arrival of the ambulance, that they gave different stories about what happened to Garrett, that they took a vacation after his death and “got away from everything,” and that Erica Goodner casually told a friend that she would not be able to throw darts because of the death of her son days earlier.

Regarding the “seriousness of the offense” factor, we note that although Erica Goodner was indicted for the crimes of felony murder, aggravated child abuse, and conspiracy to commit aggravated child abuse, she was convicted of the significantly lesser offenses of criminally negligent homicide and reckless aggravated assault. This court has previously concluded that the leniency of a jury verdict can be considered by the trial judge in denying alternative sentencing:

“This factor [of jury leniency] is properly considered by the court in finding that confinement is necessary under section 103(1)(B).” State v. Steven A. Bush, No. 01C01-9605-CC-00220, slip op. at 9 (Tenn. Crim. App., at Nashville, June 26, 1997) (citing State v. Frederick Dona Black, No. 03C01-9404-CR-89-133-111, slip op. at 4-5 (Tenn. Crim. App., Nashville, Aug. 29, 1990) (Dwyer, J., concurring and dissenting)), pet. for perm. app. filed (Tenn. Aug. 20, 1997); see also Michael D. Frazier, slip op. at 12. Thus, the trial court did not err in denying alternative sentencing based upon section 40-35-130(1)(B).

State v. Samuel D. Braden, No. 01C01-9610-CC-00457, 1998 WL 85285, at *8 (Tenn. Crim. App., at Nashville, Feb. 18, 1998). Therefore, we conclude that the trial court properly denied alternative sentencing to Erica Goodner under section 40-35-103(B). _____

V. Trial Court’s Refusal to Admit into Evidence Troy Goodner’s Statement to Police.

Erica Goodner argues that the trial court erred in failing to admit excerpts of Troy Goodner’s statement to police, which he gave the same day that Garrett was taken to the hospital. She contends that Troy’s statement was not hearsay because it was not offered to prove the truth of the matter asserted. Specifically, Erica contends that the statement was not to prove the truth of any matter but

instead “supported [Erica’s] defense that Troy Goodner was culpable, [that he] tried to make up believable stories about [Garrett’s] injuries, and [that he] actively provided inconsistent theories for the child’s injuries in an effort to cover up his crime.” Because Troy’s statement to police was not admitted, Erica argues that she was unable to use the exculpatory facts contained in the statement and that she was unable to confront a material witness, since Troy did not testify at trial. The State contends that the trial court did not abuse its discretion in refusing to admit Troy Goodner’s statement on the ground that the statement constituted inadmissible hearsay.

Troy Goodner’s May 21, 2004 statement to police follows:

Uh.. I picked Garrett up ..uh.. cause he was in his bed and when I went to pick him up I pulled the covers off of him and I realized he was sort of jerking and he acted like .. acted like you do when you yawn and you stretch when you first wake up in the morning but he didn’t stop so I picked him up, realized he was stiff as a board and I laid him on the floor right beside his bed and I took off .. I run to the top of the stairs and I yelled [sic] down to Erica and told her to.. and told her to call 9-1-1, something was wrong and I went back in and when I was sitting there I noticed he was .. you could hear like a grind, like a pop and I pulled his bottom lip down and I realized that his teeth were almost grinding on each other and also there’s a little bit of like a.. almost like you bust your lip and you don’t get it all off or you eat something and you have that trace around the top of your lips and it was a little bit of blood and he had a little bit that was still dry on the corner of his lip and I went in and he was sweating real bad but the covers was damp on the covers and I went and got a wet rag and I was wiping his face off and I.. I tried to wipe it off with my finger and that’s how I realized it was dry so I knew it had been there. It wasn’t [sic] something.. cause he bites his tongue and I.. I knew it wasn’t [sic] something that had just happened so there was enough of it that it dried on the edge of a piece of his lip and it took me wiping it off with a damp rag for it to come off so it had been there for more than, you know, ten (10), fifteen (15), twenty (20), or thirty (30) minutes, an hour, two (2) hours, whatever. It was dry blood and then I carried him downstairs and he was still in a.. not a shake shake, he slowly came like he was coming out of shaking but he was still so stiff he.. you couldn’t even bend his arms, his legs or nothing. He was _____ a little bit from the mouth and he had like a gurgle when he tried to breathe and I remember like I say that being like my grandfather and that’s the reason I.. when she was.. they were.. she was trying to tell them what was wrong with him I was screaming at her that it was blankety blank seizure and I was screaming it through the house cause I’m trying to tell her and she wasn’t [sic] telling them what I was telling them and I mean to me I felt like that’s what he was having. He was having a seizure and I know it was.. I can’t remember how many minutes it was that my grandfather he was in a full seizure before he comes out of it but you stop your breathing, your heart goes to this certain pattern and it.. it’s your brain.. you end up having brain surgery, I mean ..uh.. brain dead and almost like, you know, I suffocate you and you suffocated for so long you die, you know, your brain stops, it gives you brain damage and I was.. that’s what I was trying to.. I put my hand on his bottom lip and was trying to pry his mouth open but then the lady came running across the street you know, while she was outside but I knew he was breathing and that’s what they said. they asked.. they asked and I’m going to do CPR

and I realize he was still breathing but it was like a gurgle breath[] in which I, you know, I know we weren't supposed to touch my grandfather any where, our fingers or hands in his mouth.

According to Rule 801(c), hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Tenn. R. Evid. 801(c). Rule 802 states that “hearsay is not admissible except as provided by these rules or otherwise by law.” Tenn. R. Evid. 802. The Tennessee Supreme Court has generally held, “questions concerning the admissibility of evidence rest within the sound discretion of the trial court, and this Court will not interfere in the absence of abuse appearing on the face of the record. State v. Pylant, 263 S.W.3d 854, 870 (Tenn. 2008) (citing State v. Dotson, 254 S.W.3d 378, 392 (Tenn. 2008); State v. Dubose, 953 S.W.2d 649, 652 (Tenn. 1997); State v. Van Tran, 864 S.W.2d 465, 477 (Tenn. 1993); and State v. Harris, 839 S.W.2d 54, 73 (Tenn. 1992)). A trial court is found to have abused its discretion when it applies “an incorrect legal standard or [reaches] a decision which is illogical or unreasonable and causes an injustice to the party complaining.” State v. Ruiz, 204 S.W.3d 772, 778 (Tenn. 2006) (citing as an example Howell v. State, 185 S.W.3d 319, 337 (Tenn. 2006)).

In Pylant, the Tennessee Supreme Court noted Judge Witt's dissent, wherein he concluded that the admissibility of hearsay statements is a question of law and is reviewed de novo without a presumption of correctness, rather than under the abuse of discretion standard of review. Pylant, 263 S.W.3d at 871 (citing State v. Dennis Pylant, 2007 WL 1890178, at *12 (Tenn. Crim. App., at Nashville, June 29, 2007) (Witt, J., dissenting) (citations omitted), rev'd, 263 S.W.3d 854 (Tenn. 2008)). In Pylant, the supreme court also noted Judge Witt's opinion in State v. David Kyle Gilley regarding hearsay:

A trial court's first duty is to determine whether the out-of-court declarant's statement is hearsay—that is, whether it is “offered in evidence to prove the truth of the matter asserted.” Tenn. R. Evid. 801(c). No factual issue attends this determination, and it necessarily is a question of law. See Schiefelbein, 230 S.W.3d at 128; Sharon Marcel Keisling, slip op. at ----. If the statement is offered to prove the truth of the matter asserted and no exceptions apply, see Tenn. R. Evid. 803, 804, the statement is, purely and simply, inadmissible. Tenn. R. Evid. 802. At this juncture, the court has no discretion to hold otherwise, and to utilize an abuse of discretion standard at this point in the analysis ““would have us defer to a discretion that the trial court does not possess.”” See State v. Edison, 9 S.W.3d 75, 78 (Tenn.1999) (quoting Tipton, J.).

Pylant, 263 S.W.3d at 871 (citing State v. David Kyle Gilley, No. M2006-02600-CCA-R3-CD, 2008 WL 3451007, at *16 (Tenn. Crim. App., at Nashville, Aug. 13, 2008)). Ultimately, the Tennessee Supreme Court in Pylant concluded that “although this Court continues to believe that questions concerning the admissibility of evidence are reviewed under an abuse of discretion standard, we note that, in this instance, the post-conviction court committed error under either standard of review.”

Pylant, 263 S.W.3d at 871.

In this case, the State filed its Motion in Limine on October 26, 2006, requesting that the Court “exclude all hearsay statements made by any non-testifying co-defendant.” In the November 7, 2006 pre-trial hearing, the trial court requested that the attorney for each appellant file motions regarding the statements that they wished to introduce on behalf of their clients. On November 14, 2006, Erica Goodner’s attorney and Troy Goodner’s attorney filed objections to the State’s Motion in Limine. Also on November 14, 2006, Erica’s attorney filed a motion entitled “Erica Goodner’s Motion to Admit Statements of Co-Defendant Troy Goodner,” wherein she argued that Troy’s statement to police should be admitted into evidence because the statement was “not hearsay since [it is] not being offered to prove the truth of the matter asserted or that exceptions to the hearsay rule make the statements admissible pursuant to Tennessee Rules of Evidence 803 and 804.” Also, on November 14, 2006, Erica’s attorney filed an objection to the State’s motion to exclude statements of the co-defendant, Troy Goodner. In the trial court’s November 28, 2006 order, it denied the State’s motion to exclude hearsay statements because it “lack[ed] specificity” and “by ignoring the possible applicability of one or more exceptions to the general rule of exclusion, overstates the hearsay rule.” In addition, the trial court determined that its order would not preclude the admissibility of specific out-of-court statements. On December 12, 2006, the trial court entered an order stating that issues regarding out-of-court statements, and several other issues, would be set for a hearing on December 20, 2006. In the order from the December 20 hearing, the court determined that Erica Goodner’s November 14, 2006 motion “[did] not specify the reasons for offering [the] statements,” and denied the request to admit excerpts from Troy Goodner’s May 21, 2004 statement to police. At trial, Erica Goodner’s attorney made an offer of proof regarding Troy Goodner’s May 21, 2004 statement.

We conclude that the trial court erred in ruling that Troy Goodner’s statement to police was hearsay. From the record it appears that the statement was offered to prove Troy’s guilty state of mind rather than the truth of the matter asserted. However, Troy Goodner’s state of mind as reflected in the statement was not relevant to the issue at trial. Therefore, we conclude, regardless of whether the abuse of discretion standard of review or the de novo without a presumption of correctness standard of review is applied, the trial court’s decision regarding the statement’s inadmissibility was harmless error. See Tenn. R. Evid. 402.

Erica Goodner also contends that the exclusion of the excerpt from Troy Goodner’s statement violated her Sixth Amendment right to confront a witness. The Sixth Amendment to the United States Constitution gives an accused the right “to be confronted with the witnesses against him,” and this right is given to the States through the Fourteenth Amendment. In addition, the Tennessee Constitution also gives an accused the right “to meet the witnesses face to face.” The Tennessee Supreme Court has determined that the confrontation language in the Tennessee Constitution grants a higher right than the similar language in the Sixth Amendment of the United States Constitution. State v. Deuter, 839 S.W.2d 391, 395 (Tenn. 1992). However, the Tennessee Supreme Court subsequently ruled that “we have found no evidence to have been excluded under our state constitution’s confrontation clause that was not also excluded under the federal constitution’s counterpart.” State v. Lewis, 235 S.W.3d 136, 144 (Tenn. 2007).

The record indicates that the State did not offer Troy Goodner's statement into evidence. The record also clearly states that Troy Goodner did not testify at trial. Erica argues that the exclusion of the excerpt from Troy Goodner's statement violated her Sixth Amendment right to confront a witness. However, as the State eloquently argues on appeal, a confrontation clause issue only occurs when the State introduces a declarant's hearsay statement and the defendant is unable to cross-examine the declarant about that statement. The State had no obligation to offer Troy Goodner's statement into evidence or to call him as a witness. Compare State v. John Mark Burns, No. W2003-01464-CCA-R3-CD, 2004 WL 2108236, at *7 (Tenn. Crim. App., at Jackson, Sept. 21, 2004) (citing State ex rel. Byrd v. Bomar, 214 Tenn. 476, 381 S.W.2d 280, 281-82 (1964) (holding that the failure of the State to call the victim as a witness does not violate the confrontation clause)). We conclude that neither the trial court's decision regarding the inadmissibility of this statement nor the State's decision not to introduce Troy Goodner's statement violate Erica Goodner's Sixth Amendment right of confrontation.

VI. Severance of Erica's Case from Troy's Case. Erica Goodner claims the trial court erred in denying her motion to sever her case from Troy Goodner's case. Erica argues that she suffered "insurmountable prejudice" because (1) the defenses that she and Troy relied upon were antagonistic (2) the testimony of the State's witnesses regarding Troy's out-of-court statements were also antagonistic and harmful to her, and (3) Troy made conflicting out-of-court statements alleging both Erica's culpability and inculpability in this case. Erica argues that trial counsel had "to act as a second prosecutor by eliciting prejudicial evidence that would not have been admissible against the co-defendant in a separate trial." In response, the State contends that the trial court did not abuse its discretion in refusing to sever the cases and that Erica Goodner has failed to prove that she was "clearly prejudiced" as a result of the joint trial.

Often trial courts try co-defendants together in order to promote "judicial economy and efficiency." Tenn. R. Crim. P. 8, Advisory Commission Comments. A trial court has discretion in determining severance issues. State v. Burton, 751 S.W.2d 440, 447 (Tenn. Crim. App. 1988) (citations omitted). A trial court's decision to grant or deny a severance will not be disturbed unless the court clearly abused its discretion. Id. On appeal, the test that this Court must apply is whether the defendant was "clearly prejudiced in his defense by being tried jointly with his co-defendants." Id. (citing Hunter v. State, 440 S.W.2d 1, 6 (Tenn. 1969), overruled on other grounds). The defendant must show that he or she "was clearly prejudiced to the point that the trial court's discretion ended and the granting of [a] severance became a judicial duty." Parham v. State, 885 S.W.2d 375, 383 (Tenn. Crim. App. 1994) (citing Hunger v. State 440 S.W.2d 1, 6 (Tenn. 1969), superseded by statute on another issue).

Rule 14 of the Tennessee Rules of Criminal Procedure establishes the guidelines for severance of defendants. Rule 14(c)(1) states, "If the defendant moves for a severance because an out-of-court statement of a co-defendant makes reference to the defendant but is not admissible against the defendant, the court shall determine whether the State intends to offer the statement into evidence at trial." Tenn. R. Crim. P. 14(c)(1). Rule 14(c)(2)(i) states that the trial court shall sever co-defendants' cases before trial if "it is deemed necessary to protect a defendant's right to a speedy

trial or it is deemed appropriate to promote a fair determination of the guilt or innocence of one or more defendants.” Tenn. R. Crim. P. 14(c)(2)(i). Similarly, Rule 14(c)(2)(ii) provides that a court shall grant severance of co-defendants’ cases during trial if “it is deemed necessary to achieve a fair determination of the guilt or innocence of one or more defendants.” Tenn. R. Crim. P. 14(c)(2)(ii). This Court has often stated that “[d]isparity in the evidence against the defendants is not alone sufficient to warrant the grant of a severance.” State v. Howell, 34 S.W.3d 484, 491 (Tenn. Crim. App. 2000) (citation omitted).

In Bruton v. United States, the United States Supreme Court held that because of the “substantial risk” in a joint trial that the jury, despite instructions to the contrary, considered the co-defendant’s “incriminating extrajudicial statements” in finding the defendant guilty, the admission of said incriminating statements by the co-defendant violated the defendant’s right of cross-examination guaranteed by the Confrontation Clause of the Sixth Amendment. Bruton v. United States, 391 U.S. 123, 126 (1968). The Tennessee Supreme Court has determined that a defendant usually requests a severance: (1) because of antagonistic defenses or (2) where one of the defendants has made a confession that the State seeks to introduce. Dorsey v. State, 568 S.W.2d 639, 642 (Tenn. 1978). In Dorsey, the Tennessee Supreme Court stated, “[T]he rule in Bruton does not apply to confessions which [d]o not implicate the non-confessing defendant, nor does it apply to confessions from which ‘all references to the moving defendant have been effectively deleted, provided that, as deleted, the confession will not prejudice the moving defendant.’” Dorsey, 568 S.W.2d at 642 (quoting ABA Standards Relating to Joinder and Severance s 2.3(a)(ii) (1967)). Similarly, as the Tennessee Supreme Court stated, “[T]he Bruton rule proscribes, generally, the use of one co-defendant’s confession to implicate the other as being violative of the nonconfessing co-defendant’s Sixth Amendment right of confrontation.” State v. Elliot, 524 S.W.2d 473, 477 (Tenn. 1975).

Regarding antagonistic defenses, this court has concluded, “Mere hostility between defendants, attempts to cast the blame for the offense on each other, or other ‘fingerpointing and tattling will not, standing alone, justify the granting of a severance on the ground the defendants’ respective defenses are antagonistic.” State v. Russell David Farmer, et al., No. 03C01-9206-CR-00196, 1993 WL 247907 at *4 (Tenn. Crim. App., at Knoxville, July 8, 1993) (quoting United States v. Arruda, 715 F.2d 671, 679 (1st Cir. 1983)). This court has concluded that “[w]hile ‘mutually antagonistic’ defenses may mandate severance in some circumstances, they are not prejudicial per se.” State v. Ensley, 956 S.W.2d 502, 509 (Tenn. Crim. App. 1996) (citing State v. Russell David Farmer, et al., No. 03C01-9206-CR-00196, 1993 WL 247907 at *4 (Tenn. Crim. App., at Knoxville, July 8, 1993) and Zafiro v. United States, 506 U.S. 534, 537-38, 113 S.Ct. 933, 937 (1993)). Because of the difficulty in proving prejudice, very few cases have been reversed for failure to sever because of antagonistic defenses. Id. (citing Farmer, 1993 WL 247907 at *4.). “The defendant must go further and establish that a joint trial will result in ‘compelling prejudice,’ against which the trial court cannot protect, so that a fair trial cannot be had.” Id. (citations omitted).

Regarding confessions, this court has concluded that “if a defendant moves for severance based upon a Bruton problem, the trial court shall first determine whether the prosecution intends to offer the confession into evidence at trial.” State v. Edward Coleman and Sean Williams, No.

W2001-01021-CCA-R3-CD, 2002 WL 31625009, at *7 (Tenn. Crim. App., at Jackson, Nov. 7, 2002) perm app. denied (Tenn. March 10, 2003).

Here, on October 26, 2006, Erica Goodner filed a motion to sever her case from Troy Goodner's on the grounds that she would suffer "insurmountable prejudice" if tried jointly because their defenses were antagonistic, that Troy Goodner's out-of-court statement alleged her culpability, and that Troy Goodner's witnesses might be antagonistic. On November 14, 2006, Erica Goodner filed an amended motion to sever including additional case law.

At the November 7, 2006 hearing, the trial court asked Erica Goodner's attorney whether the motion to sever because of antagonistic defenses depended on which statements either side admitted into evidence. Erica's attorney agreed. In addition, the State reiterated several times that it did not intend to introduce the statements the defendants made to Detective Tilley and that these statements would be referred to only for proving that both defendants were with Garrett Goodner just before his death. The State further explained that because they were not introducing the statements Erica and Troy made to the police, this would remedy any Bruton problems. The State also argued that the statements that Erica Goodner made to the police could not be introduced by Troy Goodner's attorney because they were hearsay statements for which there is no exception. Erica Goodner's attorney and the State discussed the potential for antagonistic defenses as a reason to sever:

DEFENSE COUNSEL: And the second part of my motion to sever, Your Honor, and I quoted some law, is I don't see how these two co-defendant's defenses could be more antagonistic when the medical proof is going to be that this baby suffered a traumatic injury. There were only two people there. Their defenses can't be any more antagonistic in that it wasn't me, it must be him, or it wasn't me, it must be her. I think that under Broach and Morrow, that these defenses couldn't be any more antagonistic than that.

THE COURT: All right. So it's because of other statements. Anything the State wants to say concerning those?

PROSECUTOR: Just, Your Honor, that the law, mere antagonistic defenses are not all that it takes, it must cause actual prejudice. And if you'll look at their statement, they're not antagonistic, both of them are saying neither one of them did it. And the only case I could find where it had been granted in antagonistic defenses was in a situation where one was claiming a defense of alibi and then the other was claiming that they were together.

And I'll give Your Honor the cite on that. Because pursuant to the rules, we have complied, first, and I would submit, under Rule 8, that there should be the joinder of defendants, 8(c) and then you look at Rule 14(c), about the severance, whether the State intends to offer the statement in evidence at the trials; if so, the Court shall require the attorney to do the following. And in this particular case, we have complied with that, therefore, we eliminated the Bruton problems. . . .

THE COURT: The Court's reviewed some of the cases concerning antagonistic defenses.

. . . .

PROSECUTOR: [In] the McGlowan case . . . citing the Maybury case, which is a long-standing case, the Court said that mere finger-pointing and tattling will not . . . alone justify the granting of a severance on the grounds that the defenses are antagonistic. So I would submit that in this particular case that they have failed to prove there is prejudice by them being tried together, so I would ask that they not be severed.

At the conclusion of the hearing, the trial court indicated that it would probably not grant a severance, but he wanted to review all the arguments before making a final decision.

In its November 28, 2006 order, the trial court found the following:

Subsection (c)(1) of Rule 14 requires a trial court, on a motion to sever defendants, to ascertain whether the state intends to offer a co-defendant's out-of-court statement that refers to the movant and, if it does, allow the prosecutor to elect not to use the statement, redact inadmissible parts of the statement, or sever the movant. Subsection (c)(2) of the rule authorizes severance of defendants only as necessary to protect a defendant's right to a speedy trial or promote a fair determination of the guilt or innocence of one or more defendants.

The Court first ascertains that the state does not intend to use any part of Mr. Goodner's statement to police other than his admission that he was present at the apparent time of the victim's injury. Furthermore, although it does not intend to use his out-of-court statements to other persons, considering that those statements do not include any references to Ms. Goodner, the Court finds no ground for severance

under subsection (c)(1).

The Court next determines whether severance is necessary to promote a fair determination of the guilt or innocence of one or both defendants under subsection (c)(2) of Rule 14. Ms. Goodner does not identify any exculpatory evidence the admissibility of which depends on severance or any inculpatory evidence the inadmissibility of which depends on severance. Furthermore, because, [sic] neither defendant admits to observing the other harm the victim, neither one can reasonably argue that he or he is innocent and the other is guilty. ‘Mere attempts to cast the blame on the other will not, standing alone, justify a severance on the grounds that the respective defenses are antagonistic.’ State v. Ensley, 956 S.W.2d 502, 509 (Tenn. Crim. App. 1996) (citation omitted). The Court therefore finds insufficient ground for severance under subsection (c)(2) as well and concludes that the motion to sever defendants should be denied.

In its December 12, 2006 order, the trial court ordered that the “28 November 2006 order be amended to reflect Ms. Goodner’s objections to the state’s motions to exclude all hearsay and Mr. Goodner’s motion to admit excerpts of Ms. Goodner’s statement to police,” “that the subject amended motions and motion be set for a hearing at 11:00 o’clock a.m. on Wed. Dec. 20, 06,” and “that Ms. Goodner’s amended motion to sever defendants be reserved.”

At the December 20, 2006 hearing, the trial court ruled:

I will say the substance, though, in order for preparation sake, that the Court’s earlier ruling concerning severance will remain the same, but the defendants will not be severed based upon what has been submitted and what has been argued today. . . . [T]he severance will not be ordered and the cases at this point will proceed to trial on the 23rd day of January with both defendants.

We conclude that it was not a reversible error for the trial court to decline to sever the defendant’s cases. As the trial court noted, the State did not introduce Troy Goodner’s statement to police except to prove that he was present prior to Garrett’s injury. The trial court also noted that Troy Goodner’s statement to police does not really refer to Erica Goodner. Third, when considering whether severance was necessary to fairly determine the guilt or innocence of the defendants, it correctly notes that Erica Goodner failed to present any exculpatory evidence “the admissibility of which depends on severance or any inculpatory evidence the inadmissibility of which depends on severance.” Fourth, the trial court found that since “neither defendant admits to observing the other harm the victim, neither one can reasonably argue that he or she is innocent and the other is guilty,” and these defenses are not antagonistic which would make severance necessary.

We conclude that the court did not err in refusing to sever Erica Goodner’s and Troy Goodner’s cases. In addition, we do not conclude that the trial court erroneously admitted any out-of-court statements by Troy Goodner. Furthermore, even if it is argued that the court mistakenly

admitted certain statements made by other witnesses about Troy Goodner's out-of-court statements, we conclude that Erica was not prejudiced by such admissions.

CONCLUSION

Given that the pre-2005 version of the Tennessee Sentencing Act was applicable in this case, the trial court erred in considering enhancement factors unrelated to Erica Goodner's criminal history. Because this error negatively affected Erica Goodner's Sixth Amendment right to a jury trial, her sentence is modified for reckless aggravated assault to an effective sentence of three years. Regarding all other issues, the judgments of the trial court are affirmed.

CAMILLE R. McMULLEN, JUDGE